Supreme Court of the United States

OCTOBER TERM, 1969

No. 268

CHARLES LEE PARKER,

Petitioner,

—VS.—

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

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IN THE COURT OF APPEALS
OF NORTH CAROLINA
SIXTH DISTRICT

CHARLES LEE PARKER

v.

STATE OF NORTH CAROLINA

STIPULATION OF COUNSEL—February 15, 1968

IT IS HEREBY STIPULATED AND AGREED by the counsel for the petitioner and the Solicitor in the above case that the following shall constitute the record and the case on writ of certiorari in the above case.

IT IS FURTHER STIPULATED AND AGREED that this case came on regularly for hearing at the November 13, 1967, Special Civil Session of Superior Court of Halifax County; that the aforesaid Special Civil Session was duly organized and constituted; that the parties were properly before the Court; that the Honorable Joseph W. Parker, Judge Presiding, was duly commissioned to hold the aforesaid Special Civil Session of Court; that the captions to the pleadings need not be included in this record and case on writ of certiorari; and that the record and case on writ of certiorari were duly served on the Solicitor within the time allowed and provided by the Court; and that service of the case on writ of certiorari is accepted.

This 15th day of February, 1968.

/s/ NORMAN B. SMITH
Attorney for Petitioner

/s/ W. H. S. BURGWYN, JR.
Solicitor

IN THE SUPERIOR COURT OF HALIFAX COUNTY

[Title Omitted in Printing]

PETITION TO REVIEW CRIMINAL PROCEEDING PURSUANT TO G. S. 12-217, ET SEQ.

NOW COMES your petitioner, CHARLES LEE PARKER, proceeding in accordance with the provisions of G. S. 15-217, et seq., and respectfully shows unto the Court as follows:

1. Your petitioner is a prisoner at the Odum Prison, Northampton County, North Carolina, being held pursuant to a sentence of life imprisonment imposed by the Honorable Judge H. H. Hubbard, in the Halifax County Superior Court, on August 18, 1964, following a plea of guilty by the petitioner-defendant to the crime of first-degree burglary.

2. Your petitioner is a Negro male. The petitioner was arrested and tried at a time when he was fifteen years old. As evidence of his birth the petitioner attaches hereto a certificate of birth, duly authenticated, and designates the same as Exhibit I. He was arrested at about 8 P.M. on Thursday, July 16, 1964, in Roanoke Rapids, North Carolina, by white officers, members of the Roanoke Rapids Police Department. One of the arresting officers drew his gun on the petitioner and ordered him into a police car. The petitioner was taken by the police to an interrogation room at the City Police Department. White officers of the Roanoke Rapids City Police force interrogated the petitioner for approximately two or three hours after he was brought to the police station. The petitioner was accused by the officers of having burglarized a house and raped a female occupant of the house on Sunday, July 12, 1964. The petitioner refused to admit that he had been connected in any way with the crime of which he was accused. The officers told the petitioner that they would do all they could to help him, if he would confess. The police refused the requests of the petitioner to see his parents and to get

in touch with a lawyer. After the interrogation was over, the petitioner was placed in a small, single cell at the police station, in such a place that he could not communicate with any other person.

2. Your petitioner is informed and believes, and so alleges, that about 3:40 A.M. on Friday, July 17, 1964, officers of the Roanoke Rapids, North Carolina, City Police Department came to the house where the petitioner lived with his mother, Mrs. Viola Parker, and notified her that her son, the petitioner, was in custody at the city police station, this being the first notification that Mrs. Parker received of her son's arrest. Your petitioner is informed and believes, and so alleges, that at the time Mrs. Parker was informed of her son's arrest, one of the policemen told her that it would be no use for her to come to see her son at the police station, because under no circumstances would she be admitted. Allegations contained in the foregoing paragraph are based on the affidavit of Mrs. Viola Parker, which is attached hereto as Exhibit II.

3. The petitioner remained in the single cell in which he had been placed, as hereinbefore alleged, throughout the night of July 16-17, 1964. There was a water spigot in the cell, but during the night no water would come out of it. The next day, the water was turned on again. No food or drink was given to the petitioner while he was at the Roanoke Rapids police station. On Friday, July 17, 1964, at about 1 P.M., the petitioner was returned to the interrogation room, and there he was questioned for about an hour by two white police officers. During this interrogation, the petitioner confessed involuntarily to having committed the crimes with which the policemen accused him. After the confession was obtained, the petitioner was taken to the Halifax County Jail, in Halifax, North Carolina. There the petitioner asked the guard whether his relatives would be permitted to see him. The guard told him that they could come at visiting times. He never saw his relatives come.

4. Your petitioner is informed and believes, and so alleges, that Doris Jean Usserey, the sister of the petitioner, and other close relatives of the petitioner went

to the Halifax County Jail at least twice while the petitioner was being detained there. Your petitioner is informed and believes, and so alleges, that each time before Doris Jean Usserey and the other close relatives of the petitioner left from Roanoke Rapids to go to Halifax, they called the Halifax County Jail and asked if they could be admitted, and each time the jail attendant who answered the telephone told them that it was all right to come and visit, that the visiting hours were not over, and that they would be admitted to see the petitioner, but each time, when they arrived at the jail, and before the termination of the posted visiting hours, the jail attendant refused to admit them to see the petitioner, with the explanation that they were too late and that visiting hours were over. The allegations of the foregoing paragraph are based on the affidavit of Doris Jean Usserey, which is attached hereto and designated as Exhibit III.

5. During the August 1964 Term of the Superior Court of Halifax County, North Carolina, the grand jury of the said county returned as a true bill an indictment of the petitioner for the crime of first-degree burglary. A copy of the said indictment is attached hereto and designated as Exhibit IV. Your petitioner is informed and believes, and so alleges, that Negroes had been systematically excluded from service on the grand juries of Halifax County, including the grand jury which returned the indictment against the petitioner and all the grand juries for the four-year period immediately preceding that time. More particularly, your petitioner is informed and believes, and so alleges, that Negroes comprised about forty-five per cent of the population of Halifax County of persons twenty-one years and older, during the period in question, and that Negroes comprised approximately thirty-nine per cent of the total persons contained on the tax lists of Halifax County, but that of the ninety-eight individuals who served on all of the grand juries which sat in Halifax County from August, 1959, through August, 1964, only six were Negroes, and of the eighteen jurors who sat on the grand jury which indicted the petitioner, only one was a Negro. Further, the petitioner is informed and believes, and so

alleges, that the probability of getting six or fewer Negro jurors out of a total of ninety-eight jurors selected, if a selection method is used which is completely non-discriminatory as to race, in a county with a Negro population comparable to that of Halifax County, is such a small probability that it is considerably less than one in ten million. The allegations of the foregoing paragraph are based on the affidavit of Robert C. Waters and Hugh B. Rogers, Jr., which is attached hereto and designated as Exhibit V, and the affidavit of Hubert M. Blalock, Jr., which is attached hereto and designated as Exhibit VI.

6. Mr. Dwight L. Cranford, of the Halifax County Bar, was appointed by the Court to represent the petitioner at his trial. Mr. Cranford visited the petitioner once for about ten to fifteen minutes on July 17, 1964, that is, on the day the petitioner was taken from the city police station to the county jail. The petitioner did not see his lawyer again until shortly before the trial on August 18, 1964. Shortly before the trial was to commence, Mr. Cranford told the petitioner that the only thing he could do was plead guilty, that that was the only way he could help himself. Mr. Cranford coached the petitioner and suggested the correct answers to give to the Judge's questioning, following the tender of a plea of guilty. The petitioner formed his decision to plead guilty on the basis of advice by counsel. In arriving at this decision, the petitioner did not consider whether he had been validly indicted and whether he had a right to challenge his indictment. Also, he did not consider that he would be able to prevent the involuntary confession which he had made to the police, from being used against him at the trial, and the threatened use of the involuntary confession was a motivating factor in the petitioner's decision to plead guilty.

7. Under the circumstances preceding and during the petitioner's trial and sentence in 1964, as described above, the rights of the petitioner under the Constitution of North Carolina and the Constitution of the United States of America, were violated in one or more of the following particulars:

(a) An involuntary confession of crime was coerced from the petitioner by members of the Roanoke Rapids police force, and the petitioner's plea of guilty was a product of the coerced confession, and therefore the plea of guilty was involuntary, and the imprisonment of the petitioner under a sentence based on such an involuntary plea of guilty, is in violation of the 5th, 6th and 14th Amendments to the Constitution of the United States of America, and Sections 11 and 17 of Article I of the Constitution of North Carolina;

(b) The indictment of the petitioner was invalid in that members of the petitioner's race had been and were systematically excluded from the grand juries of Halifax County, and the imprisonment of the petitioner based on a conviction and sentence on such an indictment, without an intelligent waiver by the petitioner of his right to be indicted by a legally-constituted grand jury, is in violation of the 5th and 14th Amendments to the Constitution of the United States of America, and of Sections 1, 12, and 17 of Article I of the Constitution of North Carolina.

8. The questions raised in this petition have not heretofore been raised or passed upon by any Court of competent jurisdiction. The petitioner has participated in no previous proceedings to secure relief from the conviction.

9. Your petitioner is without funds to pay the costs of this proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding, and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs. Your petitioner is without means of any nature sufficient to procure counsel, and he wishes counsel to be appointed to represent him. Your petitioner has been assisted in the preparation of this petition, in the gathering of evidence, in the preparation of affidavits and other exhibits which accompany the petition, and in the accomplishment of legal research by Norman B. Smith, an attorney at law, of Greensboro, North Carolina, who has assisted the petitioner in these respects without the payment of compensation or the promise of payment of compensation by the petitioner.

WHEREFORE, your petitioner prays the Court as follows: (a) That the petitioner's imprisonment be adjudged illegal and invalid by reason of the matters set out in the petition; (b) that the Court order that the petitioner be discharged from the custody of the respondent; (c) that the petitioner be permitted to proceed to prosecute this proceeding without providing for the payment of costs; (d) that the Court appoint counsel to represent the petitioner in this proceeding; (e) that this verified petition be taken as an affidavit to establish the allegations contained therein; and (f) that the Court grant the petitioner such other and further relief as to the Court may seem just and proper.

Petition drawn by:

NORMAN B. SMITH

(Verified 7/9/67 by Charles Lee Parker.)

EXHIBIT # 1 TO PETITION

CERTIFICATE OF BIRTH
STATE OF NORTH CAROLINA
OFFICE OF REGISTER OF DEEDS

County of Halifax Address: Halifax N. C.
Name: CHARLIE LEE USSERY Sex: Male
Date of Birth: April 28, 1949.
County of Birth: Halifax.

PARENTAGE

Father	Mother
Name:	Maiden name: Edith Viola Ussery
Age at time of this birth	Age at time of this birth:
Race	19 Race: Negro
Place of birth	Place of birth: N. C.

Date Filed: 4-30-49 Reg. Dist. # 42-00
Cert. # ———

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I do hereby certify that the above is a true copy of the essential facts recorded on the birth record on file in this office for the individual named hereon.

Witness my hand and official seal this the 4 day of May, 1967.

F. D. WILSON
Register of Deeds

By: JUANITA A. EDWARDS
Asst. Register of Deeds,
Halifax County, N. C.

[SEAL]

EXHIBIT # 2 TO PETITION

AFFIDAVIT OF VIOLA PARKER

VIOLA PARKER, being first duly sworn, deposes and says:

1. Her name is Viola Parker. She lives at 133 Wilkins Street, Roanoke Rapids, North Carolina. She is the mother of Charles Lee Parker, who was convicted in the Halifax County Superior Court on August 18, 1964, on a charge of burglary and was given a life sentence.

2. At about 3:40 A.M. on Friday, July 17, 1964, officers from the Roanoke Rapids, North Carolina, City Police Department, came to her house and notified her that her son, Charles Lee Parker, was in custody at the city police station. A policeman told her that it would be no use for her to come to see her son at the police station, because under no circumstances would she be admitted. This was the first notification that the affiant received of her son's arrest.

VIOLA PARKER
Affiant

(Sworn to 6/19/67.)

EXHIBIT # 3 TO PETITION

AFFIDAVIT OF DORIS JEAN USSEREY

DORIS JEAN USSEREY, after first being duly sworn, deposes and says:

1. Her name is Doris Jean Usserey. She is the sister of Charles Lee Parker, who was convicted of burglary and given a life sentence on August 18, 1964. She lives in Roanoke Rapids, Halifax County, North Carolina.

2. The affiant learned on or about July 17, 1964, that her brother Charles Lee Parker was being held at the County jail in Halifax, North Carolina, on a charge of burglary. She and other close relatives of Charles Lee

Parker went to the Halifax County jail at least twice while Charles Lee Parker was being detained there. Each time before they left from Roanoke Rapids to go to Halifax, they would call the Halifax County jail and ask if they could be admitted. Each time the jail attendant who answered the telephone would tell them that it was all right to come and visit, that visiting hours were not over, and that they would be admitted to see Charles Lee Parker. Each time, when they arrived at the jail, and before the termination of the posted visiting hours, the jail attendant would refuse to admit them to see Charles Lee Parker, with the explanation that they were too late and that visiting hours were over.

DORIS JEAN USSEREY
Affiant

(Sworn to 6/19/67)

EXHIBIT # 4 TO PETITION

MINUTES OF THE COURT

DAN E. JOSEY, JR.
Foreman Grand Jury

6815

STATE

vs

CHARLES LEE PARKER

Burglary

The foreman and fourteen members in open court return the following as a true bill in this case:

SUPERIOR COURT
AUGUST TERM A.D. 1964

STATE OF NORTH CAROLINA
HALIFAX COUNTY

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Charles Lee Parker, late of the

County of Halifax on the 12th day of July, in the year of our Lord one thousand nine hundred and sixty-four, with force and arms, at and in the county aforesaid, unlawfully, willfully and feloniously and burglariously did break and enter, at and in the hours of eleven forty five o'clock P.M. in the night of the said day, the dwelling house of one Silas M. Rowland, there situate, and then and there actually occupied by Mrs. Silas M. Rowland and others, with the felonious intent, he, the said Charles Lee Parker, to forcibly and violently ravish and carnally know Mrs. Silas M. Rowland, a female occupying and sleeping in said dwelling house, without consent and against her will, against the form of the statute in such case made and provided and against the peace and dignity of the State.

W. H. S. BURGWYN JR.
Solicitor

By NICHOLAS LONG

No. 6815

STATE
vs
CHARLES LEE PARKER

Indictment Various Cases
State, Pros.

Witnesses:

X Mrs. Silas M. Rowland
C. G. Caraway
W. H. Wheeler X
J. R. Daniel
J. Y. Duffee
Donald Pepper

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury and this bill found A true bill.

DAN E. JOSEY, JR.
Foreman Grand Jury

EXHIBIT # 5 TO PETITION

AFFIDAVIT OF ROBERT C. WATERS AND HUGH B. ROGERS, JR.

ROBERT C. WATERS and HUGH B. ROGERS, JR., after being first duly sworn, depose and say:

1. Robert C. Waters lives at 614-A Hubbard Drive, Chapel Hill, North Carolina. Hugh B. Rogers, Jr. lives at B-7 University Gardens, Chapel Hill, North Carolina. Both of the affiants are students enrolled at the Law School of the University of North Carolina at Chapel Hill, North Carolina.

2. The affiants were requested by Norman B. Smith, an attorney of Greensboro, North Carolina, to examine the grand jury rolls of Halifax County, North Carolina, and make findings as to the number of Negroes who served on grand juries in that county from 1960 through 1964, and as to the methods used in Halifax County for the selection of grand jurors.

3. The affiants went to the courthouse at Halifax, Halifax County, North Carolina, on March 17, 1967, and on April 11, 1967. During their visits to the courthouse they talked to Mr. F. D. Wilson, Registrar of Deeds. Mr. Wilson stated that he acts as clerk to the county commissioners of Halifax County and as an ex officio member of that body. He said that the county commissioners act as jury commissioners for the county. Mr. Wilson stated that he was familiar with the past and present methods for grand jury selection in Halifax County. He said that prior to 1967, the following procedure was used:

> The jury box was filled every two years by the commissioners using names selected from the tax list. These lists, one for each township, are maintained in segregated fashion with white persons listed in the front of each list and Negro persons listed in the rear pages. Each page of each list is stamped "white" or "colored" as the case may be. Another list, consisting almost entirely of the names of Negro persons, was introduced for use by the

jury commissioners by Mr. Branch, the Chairman, with the explanation that would insure that there would be some colored people on the juries. In selecting those who would serve, the commissioners relied on their knowledge of the county's people. They selected only people they knew or who were known to acquaintances of theirs, whom they asked for suggestions. This procedure, they felt, was in effect directed by the statutory requirements for intelligence and moral character on the part of jurors. Each jury box contained about 2,500 names selected in this manner. The grand jurors were chosen from the jury boxes at random. Before the construction of a recent addition to the court house, there were no rest room facilities for female jurors, and thus no women served on juries.

Mr. Wilson told the affiants that in a recent capital case, a Negro lawyer from Warrenton had challenged the jury selection system in Halifax County. Concern over this allegation, and the availability of rest-room facilities for female jurors in the new court house, motivated the commissioners to make a complete re-evaluation of their jury selection procedure. Mr. W. H. Burgwyn, Jr., solicitor for the district which includes Halifax County, suggested that the commissioners write to the Attorney General of North Carolina for legal advice on a better system for jury selection. This was done, and the advice of the Attorney General was received. A new plan was adopted by resolution of the commissioners on February 14, 1967. Mr. Wilson described the new plan as follows:

> Only the list of registered voters of the county, which is not maintained in a segregated fashion, is used as a source for jurors. From this list, every fifth or sixth name is put into the jury box unless one of the commissioners has information as to the person's unfitness to serve. The box now contains about 4,000 names. There are many more colored persons included in the jury box now than there were under the former system.

4. The affiants obtained from the Clerk of Court of Halifax County the names of ninety-eight people who served on all of the grand juries which sat in Halifax County from August 1959 through August 1964. Eighteen members served on each grand jury, with nine new members selected each six months. During this time, the minute book showed that one member was excused after having been seated; thus there were a total of ninety-eight grand jurors.

5. Since there was no designation of race in the minute books, it was necessary for the affiants to cross check these names with some of the lists maintained in segregated fashion. From the office of the Tax Collector of Halifax County, the affiants obtained a segregated list of all county taxpayers. In that office each township has a separate tax list for its residents. This list records white taxpayers in the front and Negro taxpayers in the rear. Each page of the list is rubber-stamped "white" or "colored," as the case may be. On some lists appear check marks which the Tax Supervisor of Halifax County explained were put there as reminders to the jury commissioners that the names which had been checked were of persons who perviously had been selected for jury duty. The information from the tax books had been transcribed to cards in an index card file. The tax supervisor told the affiants that the contents of the index card file were accurate. This file listed each taxpayer's name, township, and race. It was from this file that the affiants made the determination of the race of the persons who served on grand juries during the period in question.

6. From the above described tax records, the affiants found that from August 1959 through August 1964, there were six Negroes among the ninety-eight grand jurors who served. Of the eighteen grand jurors who sat in August, 1964, only one was a Negro.

7. The affiants counted the number of white and Negro taxpayers in Halifax County in the years 1960 and 1964. These figures were obtained from the tax lists in Halifax County Tax Collector's office. The results were as follows:

Year	White	Negro	Other
1960 tax levy	11,512	7,476	- 0 -
1964 tax levy	11,718	7,287	*129

*Indians were listed separately in 1964, but not in 1960.

8. The lists of grand jurors serving in Halifax County from August 1959 through August 1964, along with the designation of their townships and race, are set out in EXHIBIT I which is attached hereto and made a part hereof.

HUGH B. ROGERS, JR.
Affiant

ROBERT C. WATERS
Affiant

(Sworn to 5/16/67)

EXHIBIT "I"

Name	Township	Race
Minute Book #34 1 February 1960		
Cooper, K. M.	Pal.	W
Katkavek, Leo	RR	W
Bounds, Kemper	Wel	W
Killian, George	Little	W
Pulley, Cleveland T.	RR	W
Snipes, Johnny	Little	W
Northington, W. H.	RR	W
Oliver, T. F.	RR	W
Dickens, Hubert R	Enf	W
Bell, L. R.	Scot Neck	W
Wills, Charles L.	Wel	W
Dickens, Rufus		W
Capps, Clarence	RR	W
Murray, Carl F.	RR	W
Glover, Earl	RR	W
Little, J. P.	RR	W
Warren, Percy Jr.	Pal	W
Minute Book #35 Jan. 30, 1961		
Ansley, Dallas	RR	W
Boyd, Milbert	RR	W
Burnett, R. B.	Hal	W
Cheek, Ulrick	Hal	N

Name	Township	Race
Griffin, O. B.	S. Neck	W
Hudson, Ralph J.	S. Neck	W
Inabintt, O. E.	Hal	W
Kilpatrick, Knox	Wel	W
Price, B. R.	Little	N
Bryant, A. L.	RR	W
Crickmore, Albert Gray	Enf	W
Glover, T. B.	Wel	W
Medlin, Charles	Fau	W
Pike, Herbert	Fau	W
Pippin, Marvin Jr.	S. Neck	W
Kennemor, Calvin S.	RR	W
Horwitz, Frank	Enf	W
Forrest, S. A.	RR	W
January 30, 1962 Minute Book #35		
Wall, Edgar J.	RR	W
Rawls, James W.	S. Neck	W
McGee, J. E.	Wel	W
Collier, J. W.	Little	W
Dickens, Lynwood	S. Neck	W
Joyner, Nep	S. Neck	W
Boone, Milton	Wel	N
Bullock, Curtis	RR	W
Willey, John J.	Wel	W
Whitehead, W. J.	Roseneath	W
Travis, W. A. Jr.	Wel	W
Harrison, Henry Lee	S. Neck	W
Stokes, Henry M.	RR	W
Hayes, Kenneth S.	Enf	W
Trotter, J. Fred	RR	W
Pike, Herbert	Fau	W
Joyner, B. O.	S. Neck	W
Parker, Cecil L.	RR	W
Minute Book #36 January 28, 1963		
Browder, H. M.	Wel	W
Smith, Glenwood	S. Neck	W
Wells, William J.	Enf	W
Brown, Sam T.	RR	W
Lawrence, James R.	Enf	W
Smith, Cary J.	Pal	N
Clement, Walter T.	Enf	W

Name	Township	Race
Crawley, Junius	Butter	W
Overton, W. J.	Wel	W
Mouzon, T. H.	RR	W
Braswell, Thomas N.	Butter	W
Neal, J. C.	Con	W
Freeman, Dellie R.	Enf	W
Shields, Lester	Pal	N
Epps, Lloyd	RR	W
White, W. V. Jr.	RR	W
Hux, Lawrence E.	Enf	W
Randolph, Sidney	Enf	W
Minute Book #36 January 27, 1964		
Keeter, Howard	Fau	W
Vick, Harold S.	Enf	W
Powell, J. D.	RR	W
Fleming, Willie L. Jr.	Enf	W
Keeter, William Guy	Fau	W
Buckner, James D.	RR	W
Matthews, Doyle	RR	W
Parrish, J. W.	RR	W
Whitehead, A. J.	Rose	W
DeBerry, Marvin S.	RR	W
Askew, Thurman E.	RR	W
Stedman, Murray R.	Wel	W
Peede, William E.	RR	W
Liles, Murray H.	Fau	W
Freid, Harry	Wel	W
Josey, Dan Jr.	S. Neck	W
Haskins, Wesley Elmo Jr.	Fau	W
Crauford, James A.		W
Minute Book #36 August 17, 1964		
Hackney, Albert	Pal	W
Hardee, Spurgeon E.	Enf	W
Mitchell, Collins	Pal	N
Allsbrook, Tommy R.	S. Neck	W
Miles, Charlie	Wel	W
Crawley, Jim	Brinkleyville	W
Isles, Hubert H.	Butter	W
Lucas, Leon J.	Fau	W
Temple, T. D.	Pal	W

EXHIBIT 6 TO PETITION

AFFIDAVIT OF HUBERT M. BLALOCK, JR.

HUBERT M. BLALOCK, JR., after being first duly sworn, deposes and says:

1. His name is Hubert M. Blalock, Jr., and he is a professor of sociology, at the University of North Carolina at Chapel Hill, Chapel Hill, North Carolina. He received his Ph.D. degree in 1954 from the University of North Carolina, with a major in sociology and a minor in statistics. He is the author of the book, SOCIAL STATISTICS, published by McGraw-Hill in 1960, and two other books on related subjects. He has published about twenty articles on applied statistics in professional journals.

2. The affiant was requested by Robert C. Waters and Hugh B. Rogers, Jr., of Chapel Hill, North Carolina, to calculate various probabilities in connection with jury selection procedures in Halifax County, North Carolina, on the basis of data supplied to him by Robert C. Waters and Hugh B. Rogers, Jr.

3. It is well known to statisticians that ordinary lists, such as telephone directories, automobile registration lists, and tax lists, are biased against lower income persons in general, and Negroes in particular. Furthermore, it is known that, even with perfectly complete lists, the ONLY reliable method of selecting from such a list in order to avoid personal biases is to use some random method of selection. If the list is alphabetical, a close enough approximation to a random sample can be obtained by selecting every kth name from the list (e.g., every 80th or 100th name). No substitutions for idiosyncratic reasons can be permitted.

4. Random sampling, which assures no systematic long-run biases, cannot be equated with "hit or miss" sampling, or any procedure which substitutes personal judgments for chance selection. It has been shown that even the most unbiased individual cannot be counted on to select a "representative" sample, as in the case of the selection of Negro jurors there is every reason to suspect that selection biases will be inevitable.

5. The principles of sampling are based on probability theory, a branch of mathematics. The reasoning is purely deductive, but it has been found to explain results of games of chance to within any desired degree of accuracy. In cases of jury selection, it is a simple matter to calculate the probabilities of obtaining any particular distribution of jurors, either in the case of a specific panel, or for long-run distributions of jurors.

6. To make these calculations, an estimate is needed of the actual proportion of eligible Negroes in Halifax County. The overall percentage of Negroes in Halifax County has remained remarkably stable over the past several decades. According to the U. S. Census, the percentages of Negroes for the census years 1940, 1950, and 1960 were 56.8%, 56.6%, and 55.1%, respectively. In calculating the expected number of Negro jurors it is more appropriate to use the figures for adults who were 21 years and older. In 1960 the percentage of Negroes out of this group was 45.5%, whereas the comparable figure for males only was 46.1%. Lacking evidence to the contrary, it must be assumed that the overall percentage of Negroes did not decrease markedly between 1960 and 1964.

7. A conservative estimate would be that in 1964 Negroes constituted at LEAST 40 per cent of the total population 21 years and older. On the basis of this conservative figure, one can calculate the probability of getting either one or no Negroes out of a total of eighteen jurors if, in fact, the method of jury selection was not discriminatory but was strictly random. This probability can be calculated from the well-known formula for the binominal distribution which is as follows (See William Feller, PROBABILITY THEORY AND ITS APPLICATIONS: John Wiley, 1950):

$$P(r) = \frac{N!}{r!(N-r)!} p^{r} (1-p)^{N-r}$$

where, in this instance $N = 18$, the number of jurors; $r = 1$, the number of Negroes on the jury; and $p = .40$,

the proportion of eligible Negroes in the county. If we set r = 1, this gives the probability of getting exactly one Negro, and we must add to this the probability of getting no Negroes, which is $(.60)^{18}$. Making these calculations shows that the chances are only thirteen in ten thousand, or approximately one in a thousand, that unbiased selection procedures would result in only one or no Negroes. There is therefore no question that this PARTICULAR jury was not selected randomly.

8. To support this argument, there also can be an examination of the racial composition of grand juries during the five year period 1960-1964. During this interval a total of 98 persons served on grand juries in Halifax County, and only six of these were Negroes. Had Negroes been represented in proportion to their adult numbers, we would have expected approximately 40 Negro jurors. Given a sample as large as 98 jurors, the long-run frequency distributions of Negro and white jurors can be shown to approximate very closely a normal probability distribution. One may use formulas and tables as provided in any standard statistics textbook (See H. M. Blalock, SOCIAL STATISTICS: McGraw-Hill, 1960) to compute a quantity referred to as Z as follows:

$$Z = \frac{\frac{6}{98} - P}{\sqrt{\frac{(P\,1\,1\,-P)}{N}}} = \frac{6/98 - .455}{\sqrt{\frac{(.455)(.545)}{98}}} = -7.83$$

The value of Z gives the number of standard deviations from the mean of the normal distribution, and one may then use probability tables to obtain the probability of getting a Z value of a given size or larger purely by chance. Using the census figure of 45.5 per cent Negro (for those 21 and older), gives a value of Z = 7.83, which is used to obtain the probability of getting six or fewer Negro jurors out of a total of 98. This probability is so small that it cannot be found in the normal probability tables given in standard texts, being considerably less than one in ten million. A probability this small means that truly unbiased jury selection would result in six Negroes or fewer out of 98 selections approximately one time in

FIFTY MILLION YEARS, assuming that a total of 98 jurors were selected during each five-year interval! Even if 98 jurors were selected each DAY of each year, results this unusual would occur approximately once every twenty-five thousand years!

9. There is a bias in the tax registration lists, but this will not account for the extremely small percentage of Negro jurors between 1960 and 1964. Investigators found that whites and Negroes were identified separately on the Halifax County tax lists, making possible an actual count of white and Negro taxpayers. In 1960 there were listed 11,512 whites and 7,476 Negroes, giving a figure of 39.4% Negro, as compared with the 1960 census figure of 45.5% Negro (for those persons 21 and over). This difference of 6.1%, while not large, does show that tax records in Halifax County should have been supplemented by other sources before selecting the jury panels.

10. Even if one accepts the tax listings as a valid and unbiased list from which a jury panel should be selected, it can still be shown that random sampling could not have been used in selecting either the total number of jurors between 1960 and 1964, or the specific panel that indicted Charles Parker in 1964. The 1964 tax list contains 7,287 Negroes and 11,718 whites, giving a percentage of Negroes of 38.3%, which is slightly less than the percentage for the 1960 listings. Using this figure of 38.3% as the actual percentage of eligible Negroes, one can again calculate the probability of getting six Negroes or fewer out of 98 panel members. The probability once more turns out to be less than one in ten million, so that it is necessary to reject outright the assumption that the methods of selection were unbiased. Similarly, if one uses the ultraconservative estimate that the percentage of eligible Negroes was only 33.3% in 1964, the probability of getting a SINGLE jury panel consisting of one or no Negroes out of eighteen members is less than seven in a thousand.

11. In summary, the use of probability calculations shows that the chances of getting such small percentages of Negroes as actually were selected by Halifax County officials are so slight that it can unequivocally be asserted that the method of jury selection is definitely biased

against Negroes. Furthermore, the magnitude of the bias is so pronounced that it cannot be accounted for by such simple explanations as a slightly biased tax list.

HUBERT M. BLALOCK, JR.

(Sworn to 5/15/67.)

IN THE SUPERIOR COURT OF HALIFAX COUNTY

[Title Omitted in Printing]

AMENDMENT TO PETITION TO REVIEW CRIMINAL PROCEEDING

The petitioner, by leave of Court first had and obtained, amends his petition heretofore filed in this action as follows:

1. By striking out the first sentence contained in paragraph 6, and inserting in lieu thereof the following:

> 6. Mr. Dwight L. Cranford, of the Halifax County Bar, was retained by the petitioner's parents to represent the petitioner at his trial. The allegation that Mr. Cranford was retained by petitioner's parents is based on the allegation of Mr. Cranford contained in his affidavit, a copy of which is attached hereto.

2. By striking out the following matter from the petitioner's prayer for relief.

> (d) That the Court appoint counsel to represent the petitioner in this proceeding.

SMITH, MOORE, SMITH, SCHELL & HUNTER

By: Norman B. Smith
Attorneys for Petitioner.

(Verified 10/20/67 by Charles Lee Parker.)

AFFIDAVIT OF DWIGHT L. CRANFORD

The undersigned, being first duly sworn, deposes and says:

1. That he is a duly licensed attorney engaged in the general practice of law in Roanoke Rapids, Halifax County, North Carolina.

2. That on or about July 17, 1964, he was employed by Major Parker and Viola Parker, parents of Charles Lee Parker, to represent Charles Lee Parker.

3. That at the August Term, 1964, he represented Charles Lee Parker in Halifax County Superior Court; that at all times he was the privately employed attorney of Charles Lee Parker and never acted as a court-appointed attorney.

This 5th day of September, 1967.

/s/ DWIGHT L. CRANFORD

(Sworn to 9/5/67.)

IN THE SUPERIOR COURT OF HALIFAX COUNTY

[Title Omitted in Printing]

MOTION TO DISMISS

Now comes W. H. S. Burgwyn, Jr., Solicitor of the Third Solicitorial District, State of North Carolina, respondent in the above entitled action, and respectfully moves the court on behalf of said State that the purported petition for application of Post Conviction Hearing Pursuant to G. S. Statute 15-217—15-222 be dismissed for that said petition does not show on its face that there was any substantial denial of the rights of the petitioner under the proceedings complained of under the Constitution of the United States nor under the Constitution of the State of North Carolina, or both; and for that it does not comply with the provisions of G. S. 15-217, et seq.

W. H. S. BURGWYN, JR.,
Solicitor for the Third
Solicitorial District.

IN THE SUPERIOR COURT OF HALIFAX COUNTY

[Title Omitted in Printing]

ANSWER TO PETITION TO REVIEW CRIMINAL PROCEEDING PURSUANT TO G. S. 15-217, *et seq.*

Now comes W. H. S. Burgwyn, Jr., Solicitor of the Third Solicitorial District, State of North Carolina, Respondent in the above entitled action and, answering the Petition to Review Criminal Proceeding, as follows:

1. The allegations contained in paragraph (1) of the petition are admitted.
2. The allegations contained in paragraph (2) on page one of the petition are denied.
2. The allegations contained in paragraph (2) on page two of the petition are denied.
3. The allegations contained in paragraph (3) of the petition are denied.
4. The allegations contained in paragraph (4) of the petition are denied.
5. The allegations contained in paragraph (5) of the petition are denied.
6. The allegations contained in paragraph (6) of the petition are denied.
7. The allegations contained in paragraph (7) and the subsections thereunder of the petition are denied.
8. The allegations contained in paragraph (8) of the petition are denied.
9. The allegations contained in paragraph (9) of the petition are denied.

Wherefore, the respondent, having answered the petitioner's petition, moves that the petition be dismissed and denied.

W. H. S. BURGWYN, JR.,
Solicitor for the Third
Solicitorial District.

(Verified 11/17/67 by Solicitor Burgwyn.)

IN THE SUPERIOR COURT OF HALIFAX COUNTY

ORGANIZATION OF COURT—October 23, 1967

HONORABLE JOSEPH W. PARKER, JUDGE PRESIDING;
HONORABLE W. H. S. BURGWYN, JR., SOLICITOR;
HONORABLE J. REUBEN DANIEL, SHERIFF OF HALIFAX COUNTY;
HONORABLE J. C. TAYLOR, CLERK OF SUPERIOR COURT;
Mrs. Ann Williams, Court Reporter.

[Title Omitted in Printing]

ORDER ALLOWING AMENDMENT TO PETITION TO REVIEW CRIMINAL PROCEEDING

THIS CAUSE, coming on to be heard and being heard before the undersigned Judge of the Superior Court of Halifax County, upon motion of the petitioner for leave to file amendment to his petition in the above entitled action, as set out in the amendment to the complaint prepared and tendered by the petitioner, and the Court in the exercise of its discretion being of the opinion that such motion should be granted;

IT IS NOW ORDERED that the petitioner be, and he hereby is allowed to file said amendments as part of the record of this action, and the respondent is allowed 30 days from the date of this order in which to file answer or demurrer to said amendments.

This 1st day of November, 1967.

JOSEPH W. PARKER
Judge Presiding.

BE IT REMEMBERED that a Special Civil Term of Superior Court for Halifax County, North Carolina, is begun and held on this the second Monday after the fourth Monday in October, it being Monday, November 13, 1967;

HONORABLE JOSEPH W. PARKER, JUDGE PRESIDING;
HONORABLE J. REUBEN DANIEL, SHERIFF OF HALIFAX COUNTY;
HONORABLE J. C. TAYLOR, CLERK OF SUPERIOR COURT;

Miss Sallie Dickens, Court Reporter.

(COMMISSION of the Chief Justice to the Honorable Joseph W. Parker to hold a one-week Special Session of the Halifax Superior Court beginning 13 November 1967, for the trial of Civil cases, appears in the original transcript on file in the Office of the Clerk.)

NORTH CAROLINA
HALIFAX COUNTY

Court met today, Saturday, November 18, 1967, at 10 A.M. Minutes of the preceding meeting were read, corrected and approved and the following proceedings were had and taken, to wit:

T. D. No. 7518

STATE OF NORTH CAROLINA

v.

CHARLES LEE PARKER

POST CONVICTION HEARING

Court adjourns in this matter till 10 A.M. Tuesday, December 19, 1967.

Whereupon Court adjourns sine die, November 18, 1967.

/s/ JOSEPH W. PARKER
Judge Presiding.

IN THE SUPERIOR COURT

December 19, 1967

NORTH CAROLINA
HALIFAX COUNTY

Court met today pursuant to a recess on November 18, 1967, at 10 A.M. The following proceedings were had and taken, to wit:

CHARLES LEE PARKER

v.

STATE OF NORTH CAROLINA

JUDGMENT OF PARKER, J.—(12/19/67)

The above-entitled matter came on for hearing and was partially heard on November 13, 1967, in the courthouse at Halifax, Halifax County, North Carolina, upon an application to set aside a sentence heretofore imposed in the Superior Court of Halifax County and grant a new trial to the petitioner, the defendant Charles Lee Parker, at this hearing under the Post Conviction Act of the General Statutes of North Carolina; that the petitioner defendant was represented by Mr. Norman Smith, of the Greensboro, North Carolina, Bar, and the State was represented by the Honorable W. H. S. Burgwyn, Jr., Solicitor, and the Honorable Willis E. Murphy, III, Assistant Solicitor; that, after a partial hearing, the Court, on page 45 of the record, adjourned the hearing and continued the same until ten o'clock Tuesday morning, December 19, 1967, for the primary purpose of allowing the petitioner defendant to secure certain information from the office of the Register of Deeds of Halifax County which was not available on said date of November 13, 1967; that, upon a full and complete hearing concluded on this the 19 day of December, 1967, the Court finds as a fact that the petitioner defendant was charged in a bill of indictment returned by the grand jury at the August Term, 1964, charging the capital offense of burglary and that upon a plea of guilty at said term of court said petitioner defendant was sen-

tenced by the Honorable Howard H. Hubbard, Judge presiding, to the State Prison for the term of his natural life. The Court further finds the following facts:

(Petitioner defendant was arrested at approximately 9:30 to 11:00 P.M. on July 16, 1964, while burglarizing, or attempting to burglarize the home of Mr. and Mrs. Silas M. Rowland in the City of Roanoke Rapids, Halifax County, North Carolina, it being the identical home that he had a few nights previously burglarized and raped the female occupant;)

(EXCEPTION #53)

that he was carried to the police station and held for further investigation; that petitioner defendant refused to give his name and address and that, upon ascertainment by the officers of sufficient information of his identity, his mother, with whom he lived at the time, was notified by the Police Department of Roanoke Rapids about 4:30 A.M. of the following day, that is within approximately six hours of his arrest; that the mother of said petitioner defendant, upon the opening of the law office of Allsbrook, Benton, Knott, Allsbrook and Cranford early in the morning of July 17, 1964, employed the services of Honorable Dwight Cranford, a member of said firm, who is and was an experienced, learned, diligent and astute attorney and counsel at law, who immediately thereafter contacted said petitioner defendant and began preparation of his defense; (that said petitioner defendant freely admitted to his attorney his guilt of the crime with which he was charged, in fact said petitioner defendant Charles Lee Parker, upon cross examination at this hearing, and the Court so finds as a fact, has freely admitted his guilt of the capital offense of burglary and rape; however, said defendant has not at this date been indicted nor placed on trial for the capital offense of rape;)

(EXCEPTION #54)

(that the petitioner defendant was tried at said August Term, 1964, upon a bill of indictment returned by a properly and legally constituted grand jury, nine of which were selected at the first term of Halifax County Superior

Court at the beginning of the spring session of 1964, and nine at the beginning of the fall session of said Court by a child under ten years of age from the regular jury panel summoned, at each term; that there was one Negro present on the grand jury which returned said bill of indictment a true bill; that there has been so systematic or purposely exclusion of persons of any race in selection of those for jury service by the Board of Commissioners of Halifax County; that said commissioners have excluded from jury service persons white, Negro, Indian and others who in its opinion were infirm in body or mind, had been convicted of felonies, or otherwise incompetent under the applicable provisions of the law of North Carolina;)

(EXCEPTION #55)

(that as the record unquestionably reflects, and the Court so finds as a fact, said petitioner defendant Charles Lee Parker, freely, voluntarily, without threat, coercion or duress, entered a plea of guilty to the offense of first-degree burglary before His Honor Howard H. Hubbard at the August Term, 1964, of the Superior Court of Halifax County and was thereupon sentenced as required by law to the North Carolina State Penitentiary for the term of his natural life;)

(EXCEPTION #56)

(that the petitioner defendant has stated at this hearing that he was content with his plea and sentence and completely satisfied with the effort of his attorney, the Honorable Dwight Cranford, until some few months after incarceration when he learned that other persons had been sentenced to five to six years for the same crime with which he was charged, which statement as to a sentence of five to six years for the identical crime charged against petitioner defendant, Charles Lee Parker, is erroneous in law and false in fact, although said petitioner defendant might have considered the same true;)

(EXCEPTION #57)

(that no particular statement has been made at these hearings denying the truthfulness of the petitioner de-

fendant's plea and guilt of the offense charged. To the contrary, the petitioner defendant, in person and from the witness stand, under oath, has admitted on cross examination the truth of the charge).

(EXCEPTION #58)

The petition of the petitioner defendant, Charles Lee Parker, is hereby denied.

It is so ordered this 19 day of December, 1967.

JOSEPH W. PARKER
Judge Presiding.

APPEAL ENTRIES

To the foregoing judgment the petitioner in open court gives notice of appeal to the North Carolina Court of Appeals; further notice waived.

It further appearing to the Court that the petitioner is an indigent, it is ordered that no bond for this appeal be required.

Upon motion by the defendant, through counsel Mr. Norman Smith, that the defendant be allowed to appeal in forma pauperis, for that he is unable to defray the cost of a record, the Court finds as a fact that the defendant is indigent and unable to defray the cost of the record for the purpose of appeal; whereupon it is ordered that the County of Halifax furnish to Mr. Norman Smith, Attorney for the Defendant, a copy of the record of this hearing.

Petitioner is allowed 45 days in which to serve case on appeal. The State is allowed 30 days thereafter to serve countercase or exceptions.

This the 19 day of December, 1967.

JOSEPH W. PARKER
Judge Presiding

IN THE COURT OF APPEALS OF NORTH CAROLINA

[Title Omitted in Printing]

PETITION AND APPLICATION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEALS OF NORTH CAROLINA:

Charles Lee Parker, the petitioner in the above-entitled proceeding, respectfully petitions and makes application to this Honorable Court for a writ of certiorari to issue in this case which was heard at the November 13, 1967, Special Civil Session of the Superior Court of Halifax County. As grounds for this petition and application, the petitioner respectfully shows to the Court:

1. This is a proceeding under the North Carolina Post-Conviction Hearing Act, G. S. 15-217, et seq. The petitioner was sentenced to life imprisonment upon a guilty plea in the Halifax County Superior Court on August 18, 1964. In this proceeding, your petitioner alleged that the acceptance of plea and imposition of sentence upon him were in violation of the Constitution of North Carolina and the Constitution of the United States in the following particulars:

(a) An involuntary confession of crime was coerced from the petitioner by members of the Roanoke Rapids police force, and the petitioner's plea of guilty was a product of the coerced confession, and therefore the plea of guilty was involuntary, and the imprisonment of the petitioner under a sentence based on such an involuntary plea of guilty, is in violation of the 5th, 6th and 14th Amendments to the Constitution of the United States of America, and Sections 11 and 17 of Article I of the Constitution of North Carolina;

(b) The indictment of the petitioner was invalid in that members of the petitioner's race had been and were systematically excluded from the grand juries of Halifax

County, and the imprisonment of the petitioner based on a conviction and sentence on such an indictment, without an intelligent waiver by the petitioner of his right to be indicted by a legally-constituted grand jury, is in violation of the 5th and 14th Amendments to the Constitution of the United States of America, and of Sections 1, 12, and 17 of Article I of the Constitution of North Carolina.

2. At the post-conviction hearing, the petitioner offered evidence tending to prove the following facts with respect to his indictment by a grand jury:

(a) The petitioner is a Negro;

(b) The 1960 tax levy of Halifax County showed approximately 11 thousand white taxpayers and approximately 7 thousand colored taxpayers. The 1964 tax levy of Halifax County showed approximately 11 thousand white taxpayers and 7 thousand Negro taxpayers;

(c) The 1960 Census of Halifax County showed that the population of Halifax County was 45.3 white and 54.7 Negro. The 1960 Census of Halifax County showed that the population of Halifax County of persons 21 years of age and over was 54.5 white and 45.5 non-white (the non-whites being 98% Negro);

(d) From January, 1960, through August, 1964, the total numbers of jurors serving on all jury venires in Halifax County were 2,820 white persons and 134 colored persons;

(e) The grand jury which indicted the petitioner in August, 1964, was composed of seventeen white persons and one colored person.

(f) On all the grand juries drawn between January, 1960, and August, 1964, there were 91 white persons and 8 colored persons.

(g) Neither the petitioner's counsel nor any other person at the time of his trial and sentence brought to petitioner's attention the racial composition of grand juries in Halifax County, and before entering his plea of guilty, the petitioner did not consider whether he had been validly indicted or whether he had a right to challenge his indictment.

None of the above evidence was refuted or disproven by the State, nor did the State introduce any evidence to the contrary, excepting the unsupported opinion of the Clerk to the Halifax County Jury Commission that the Commission had not purposely excluded Negroes from service on the grand jury.

3. In the post-conviction proceeding, the petitioner introduced evidence tending to prove the following facts relevant to the issue of whether his sentence was based on a coerced guilty plea:

(a) The petitioner was arrested and tried at a time when he was fifteen years old.

(b) He was arrested at gunpoint by officers of the Roanoke Rapids Police Department, and was taken to an interrogation room at the City Police Department. There he was interrogated for an hour or two. He told the officers he wanted to see his lawyer and his mother; they said he would not see them until he told them what the officers wanted to know. During his interrogation, the petitioner refused to tell the officers anything, even his name. He was not given anything to eat or drink. Thereafter, he was put in a cell by himself. There was a drinking fountain in the cell, but no water came out of it. He stayed in the cell until the next day, at which time he was taken out and questioned again by some of the officers. The officers promised the petitioner that they would help him the best they could if he would confess. During this second interrogation, the petitioner made a statement and then signed a confession to the effect that he had broken into the house. He was interrogated on this second occasion for about an hour. It was not until after he confessed that the petitioner was given anything to eat. The petitioner was arrested during the evening of July 16, 1964, and the confession was obtained sometime the following morning.

(c) At about 3:40 A.M. on the day following petitioner's arrest, officers of the Roanoke Rapids Police Department notified the petitioner's mother, Mrs. Viola Parker, that her son was in custody. The police told Mrs. Parker that it would be no use for her to come to

see her son at the police station, because under no circumstances would she be admitted.

(d) After the petitioner confessed, he was taken to the Halifax County jail, where he stayed until August 18, 1964. The petitioner's sister, Doris Jean Usserey, attempted to visit the petitioner while he was in jail on three different occasions. Miss Usserey called to the County jail to find out what visiting hours were, and each time she attempted to visit the petitioner, she came at a time which she had been advised was in the visiting hours period. On each occasion, officers at the jail refused to let Miss Usserey see the petitioner. The petitioner's mother was delivered of a baby a few days after petitioner's arrest, and she did not see him until the day before the trial. The petitioner did not see any member of his family from the date of his arrest until the day before his trial.

(e) The attorney for the petitioner, retained by his family, said that since the petitioner had given the confession there was not much the attorney could do and about the best thing would be for the petitioner to plead guilty.

(f) The petitioner did not consider that he would be able to prevent the involuntary confession which he had made to the police, from being used against him at the trial, and the threatened use of the involuntary confession was a motivating factor in the petitioner's decision to plead guilty.

(g) A psychiatric evaluation of the petitioner made within two weeks after he was taken to Central Prison revealed that petitioner's behavior could be easily swayed, that he was likely to enter into activities impulsively, and there were no inhibitions which would prevent him from engaging in behavior that presented itself as a means of securing his immediate goals.

In rebuttal of the above, the State offered evidence tending to prove the following facts:

(a) Mr. Dwight Cranford, the petitioner's attorney, talked to the petitioner shortly after the petitioner had confessed on the morning following his arrest. The petitioner told Mr. Cranford that no threats or promises

had been made to him, and that he was not scared. Mr. Cranford discussed the case further with the petitioner at the Halifax County jail. Mr. Cranford saw the petitioner "not more than once or twice" during the time he was in the County jail and before the week of the trial. During the week of the trial, Mr. Cranford spent most of the days af August 17 and August 18 with the petitioner and his mother in one of the side rooms at the courthouse.

(b) The petitioner's mother, Viola Parker, signed an affidavit saying that she knew and understood the nature and seriousness of the charge of first-degree burglary pending against the petitioner, that she had discussed the matter with Mr. Cranford, with her husband, and with the petitioner, and that after full discussion and consideration she consented to the petitioner's entering the guilty plea.

(c) The petitioner signed a statement saying that he was aware of the charge of first-degree burglary against him, that he had been explained the nature and seriousness of the charge, that he had not been threatened or abused in any manner, and that no promises had been made to him to induce him to plead guilty, that he had discussed the matter with his lawyer and his mother, and that he authorized his lawyer to enter a plea of guilty to first-degree burglary with the understanding that he would be sentenced to life imprisonment.

4. During the post-conviction proceeding, the Superior Court committed a number of prejudicial and reversible errors in admitting the evidence over petitioner's objection, and excluding evidence offered by the petitioner. These errors are set out and grouped in the petitioner's Assignments of Error. In summary, these errors in the admission and exclusion of evidence are as follows:

(a) Excluding evidence of the petitioner's thoughts as to whether or not the police would be able to use the petitioner's confession against him in trial.

(b) Admitting evidence which pertained only to the question of petitioner's guilt or innocence of the crime of which he was convicted.

(c) Admitting evidence which pertained only to statements made by thoughts of the petitioner and his mother during the several months subsequent to the petitioner's trial and sentence, such as evidence of a letter written by the petitioner to his attorney some 30 to 60 days after he had been in prison, expressing appreciation for what the attorney had done for him.

(d) Excluding testimony of an expert statistician offered by the petitioner to show the probabilities of arriving at a racial distribution of grand jurors in Halifax County on an unbiased basis, identical to the actual racial distribution of grand jurors during the four and one-half years preceding the petitioner's indictment, and as to the specific grand jury which returned the indictment against the petitioner.

5. During the post-conviction proceeding, the Superior Court committed prejudicial and reversible error in the following respects:

(a) Refusing and failing to rule on petitioner's objections to questions asked by the Solicitor.

(b) Refusing to permit the petitioner to place on the record for consideration by the Court of Appeals the testimony of a witness to which the Solicitor's objection had been sustained.

To these errors, exceptions were taken and assignments of error were made.

6. The order of the Superior Court of Halifax County denying the relief prayed for by the petitioner is erroneous and reversible in that it contains findings of fact which do not pertain to any issues or questions of fact properly before the Court. Specifically, it contains findings of fact that the petitioner was in fact guilty of the crime with which he was charged, and that the petitioner was satisfied with the results of his trial and sentence until several months after he had been in the State prison. These errors are the subjects of exceptions and assignments of error.

7. The Superior Court of Halifax County committed reversible and prejudicial error in its order denying the relief prayed for by the petitioner, by making findings

adverse to the petitioner on the two substantive issues raised in the petition, as follows:

(a) The Court's finding that there has been no systematic or purposeful exclusion of persons of any race in selection for jury service in Halifax County, and that the grand jury which indicted the petitioner was legally constituted, is erroneous because it is not supported by any competent evidence, and because more particularly the State, as a matter of law, failed to overcome the prima facie case of systematic exclusion of Negroes from service on Halifax County grand juries because of race, which arose from the petitioner's evidence.

(b) The finding that the petitioner freely, voluntarily, without threat, coercion or duress, entered a plea of guilty to the offense of first-degree burglary is erroneous because, being a question of both fact and law, it is not supported by sufficient evidence.

To the above errors, the petitioner entered exceptions and made assignments of error.

8. In open Court, the petitioner gave notice of petition to the Court of Appeals of North Carolina for a writ of certiorari, and further notice was waived. The Court found that the petitioner is indigent and ordered that no bond be required and that the County furnish a copy of the record to the petitioner. The petitioner attaches hereto and makes a part hereof the record of the proceedings before the Superior Court of Halifax County, the case on petition for a writ of certiorari, and the petitioner's Assignments of Error.

WHEREFORE, the petitioner prays the Court that writ of certiorari issue to the Superior Court of Halifax County, and that the petitioner be given leave to proceed in this Court in forma pauperis.

This 14th day of February, 1968.

Respectfully submitted:

By: /s/ NORMAN B. SMITH
Attorney for Petitioner

(Verified 2/14/68 by Norman B. Smith, Attorney for Petitioner.)

COURT OF APPEALS OF NORTH CAROLINA

[Title Omitted in Printing]

Order Allowing Petition for Writ of Certiorari

This matter came on to be considered upon a Petition for Writ of Certiorari on the 14th day of March, 1968, by the North Carolina Court of Appeals, to whom it appeared that the said petition should be allowed;

NOW, THEREFORE, it is ordered accordingly by the Court in Conference that the petition be, and the same is hereby allowed and that the case is set for hearing at the Call of the Calendar of the Fourth, Fifth, Sixth and Eighth Districts and will be heard in its regular order at the Spring Session, 1968, and that it be so certified to the Clerk of the Superior Court of Halifax County, North Carolina. Morris, J., did not participate.

Witness my hand and official seal this the 15th day of March, 1968.

/s/ Theodore C. Brown, Jr.
Clerk of the Court of Appeals

COURT OF APPEALS OF NORTH CAROLINA

[Title Omitted in Printing]

Statement of Case on Appeal

This was a matter that came on for hearing pursuant to the provisions of the North Carolina Post Conviction Hearing Act, G. S. 15-217, et seq., and being heard before His Honor John W. Parker, Judge Presiding, at the November 13, 1967, session of Halifax County Superior Court, and again out of session at the Halifax County Courthouse on December 19, 1967. The petitioner was represented by Norman B. Smith, of the firm of Smith, Moore, Smith, Schell & Hunter, of Greensboro, North Carolina. The State was represented by the Honorable

W. H. S. Burgwyn, Solicitor, and the Honorable Willis E. Murphy, III, Assistant Solicitor. The petitioner was heard upon allegations that the sentence of life imprisonment he was then serving, imposed upon him on August 18, 1964, by the Halifax County Superior Court, the Honorable H. H. Hubbard, Judge Presiding, following a plea of guilty of the crime of first-degree burglary, was void and should be set aside, for violation of the rights of the petitioner under the Constitution of North Carolina and the Constitution of the United States of America, in the following respects:

(a) An involuntary confession of crime was coerced from the petitioner by members of the Roanoke Rapids police force, and the petitioner's plea of guilty was a product of the coerced confession, and therefore the plea of guilty was involuntary, and the imprisonment of the petitioner under a sentence based on such an involuntary plea of guilty, is in violation of the 5th, 6th and 14th Amendments to the Constitution of the United States of America, and Sections 11 and 17 of Article I of the Constitution of North Carolina;

(b) The indictment of the petitioner was invalid in that members of the petitioner's race had been and were systematically excluded from the grand juries of Halifax County, and the imprisonment of the petitioner based on a conviction and sentence on such an indictment, without an intelligent waiver by the petitioner of his rights to be indicted by a legally-constituted grand jury, is in violation of the 5th and 14th Amendments to the Constitution of the United States of America, and of Sections 1, 12, and 17 of Article I of the Constitution of North Carolina.

The State answered the petition by denying all the allegations therein to the effect that the petitioner's constitutional rights had been violated. The Court entered an order finding as fact that none of the petitioner's constitutional rights had been violated in his trial, and denying the relief prayed for in the petition. Thereupon, the petitioner gave notice of a petition for a writ of certiorari to the Court of Appeals of North Carolina, and moved that the appeal be in forma pauperis. Fur-

ther notice of appeal was waived. The Court allowed the petitioner's motion to proceed in forma pauperis, ordering that no appeal bond be required and ordering the County of Halifax to pay the costs of the petition for a writ of certiorari. The Court of Appeals allowed petitioner's petition for writ of certiorari on March 14, 1968.

PETITIONER'S EVIDENCE

CHARLES LEE PARKER, Petitioner, (sworn) testified as follows:

I reside at Odom Prison, under sentence of Halifax County Superior Court for conviction of first-degree burglary, entered on August 18, 1964. I am an eighteen-year-old Negro. I was arrested for the offense for which I am presently serving time, during July of 1964. I was fifteen years of age at that time. My sixteenth birthday was in April, 1965.

At the time I was arrested, I walked into a yard and went up to a door. A cop jumped up. I started to run and he told me not to run, and I stopped. He asked me at the police station who I was. I wouldn't tell him and said I wanted to see my lawyer and my mother. He said I couldn't see my lawyer and my mother. He said I couldn't see anybody. The police officer had a pistol. He said to stop or he would shoot, and I stopped. I was taken to jail in a police squad car, and was not handcuffed.

After being taken to the Police Department in Roanoke Rapids, I was questioned. I would not tell who I was. I told them I wanted to see my lawyer and my mother. They said I could not see them until I told them what they wanted to know. After this, they kept me in that little room "I don't know how long," and then put me in a cell. I think there were three white officers with me. It was about 11:00 P.M. at that time. They asked me my name, but I did not tell them anything at that time. I was kept there an hour or two. I was not given anything to eat or drink. They asked me my name and

I wouldn't tell them. They asked me where I was from and I wouldn't tell them that. They asked me about some other stuff, whether I broke in any houses, and I don't remember whether they referred to any specific houses. After the questioning ended, I was put in a cell by myself. There was no light in the cell, but there was a light in the hall, and a little of this light came into the cell. There was a drinking fountain in the cell, but no water in it. I stayed in the cell until the next day, but I don't know what time it was that I came out. I didn't get anything to eat, until I got ready to come to Halifax. After being taken from the cell, I was questioned again by one of the officers present in the Court today and by Chief Daniels.

MR. SMITH: Did these officers make any promises to you at that time?

WITNESS: They said they would help me the best they could. They didn't say what they would do.

They didn't say under what circumstances they would help me. I told them I wanted to see my lawyer, Cranford. They told me to tell them what I did. I told them, made a statement to them. I told them that I broke into the house and when I broke in, and signed a confession. They put me back in the cell. I was in the interrogation room about an hour then. I signed the confession before I went back in the cell. I stayed there about five minutes and the lawyer came. He was the first person I saw other than a policeman. The lawyer was Mr. Dwight Cranford. I saw him about fifteen or twenty minutes. Then I went back to my cell, and an hour or two later I was brought to Halifax. Before being brought to Halifax I was given two sandwiches to eat, about ten or fifteen minutes before getting ready to leave for Halifax. This was before I talked to Mr. Cranford, and after I made the confession. The policeman said they had forgotten I was down there. I was given drinking water the second time I was interrogated.

I was then taken to Halifax County jail, where I stayed until August 18. On August 18, I was tried and carried to Raleigh. I was told that my parents or relatives came to visit me while I was at the Halifax County jail, but I never did get to see them.

MR. BURGWYN: Objection.

I saw my attorney again the day I was tried. My attorney told me that he would do all he could to help me but there was not much he could do, and about the best thing I could do was plead guilty. He asked me about the confession or statement I had given to the police, and he said that since I had given the confession, there wasn't much he could do and about the best thing I could do was plead guilty. I then decided to plead guilty and did plead guilty.

MR. SMITH: In coming to this decision, did you consider whether or not the police would be able to introduce this statement you made in evidence against you?

MR. BURGWYN: Objection.

COURT: Sustained.

EXCEPTION # 1.

WITNESS (continuing): I did give thought to the statement that I had given to the police. I though that since I had told them everything and they knew everything, there wasn't much that my attorney could do.

MR. SMITH: Did you give any thought to whether or not the police would be permitted to give this statement in evidence at the trial?

MR. BURGWYN: Objection.

COURT: Sustained.

EXCEPTION # 2.

WITNESS (continuing): I did not know whether or not I had been indicted by the grand jury before I made the guilty plea.

MR. SMITH: Did you know anything about the racial composition of the Halifax County Grand Jury at the time you made your plea?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS (continuing): I can't say I knew anything about the racial composition of the Halifax County Grand Jury. While at the County jail, I asked one of the guards whether my relatives would be permitted to see me, and he said, "Yes, on visiting day."

MR. SMITH: Going back to testimony about what the officers told you during the interrogation, something to the effect that they would help you, didn't you testify to that?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: They said they would help me the best they could.

MR. SMITH: Did they say what you would have to do in order for them to do so?

MR. BURGWYN: Objection.

COURT: Overruled. Let the witness testify.

WITNESS (continuing): They said if I told them what I knew, they would help me the best they could.

CROSS EXAMINATION

On the night that the officers apprehended me, I was in a yard. It was not my yard, and I don't know whose yard it was.

MR. BURGWYN: You know it was the yard of Mr. Roland, didn't you?

WITNESS: I didn't know whose yard it was.

MR. SMITH: Objection.

COURT: Overruled.

WITNESS (continuing): I didn't know exactly whether it was the yard of a home I had been into before. I wasn't far from the porch; I was in the yard about ready to go to the porch. My hand was not on the door. There was not any knob. I had not pushed the screen, pulled the door, or touched the door. I don't know what time of night it was; I didn't have a watch. It was not after midnight; it was about 11:00 o'clock. The officer stopped me as he came out of the door. I refused to tell him my name and tell him where I was from. He did not ask me anything there; I refused to tell him that at the Police Department. I did not know whether any other officers were in the yard or neighborhood. I had been to a house in that neighborhood before.

MR. BURGWYN: And went in the nighttime?

MR. SMITH: Objection.

EXCEPTIONS 3 and 4.

WITNESS: That's right.

MR. BURGWYN: And you had intercourse with the woman against her will?

MR. SMITH: Objection.

EXCEPTIONS 5 and 6.

WITNESS: I can't say against her will. She didn't say anything about it.

MR. BURGWYN: You didn't tell her who you were?

MR. SMITH: Objection.

EXCEPTIONS 7 and 8.

WITNESS: She didn't ask me.

MR. BURGWYN: You didn't turn any light on in the room?

MR. SMITH: Objection.

EXCEPTIONS 9 and 10.

WITNESS: Didn't need no light.

MR. BURGWYN: She had never invited you there?

MR. SMITH: Objection.

EXCEPTIONS 11 and 12.

WITNESS: She didn't tell me not to come.

MR. BURGWYN: She didn't know you?

MR. SMITH: Objection.

EXCEPTIONS 13 and 14.

WITNESS: I didn't know her either. The officers carried me to the police station later. They wouldn't give me anything to eat or water, and wouldn't let me see anybody. I don't know what time it was. I eat supper every night, and had had supper this night. I asked the cop in the room with me for water. I don't know who he was, and I could not point him out today. I told him I wanted to see my lawyer and my mother. That was after I had gotten to the police station. I had been talking to Mr. Allsbrook, the lawyer, previously. I did not have to tell the officers what lawyer I wanted, because they told me I couldn't see anybody until I told them what they wanted to know. I did not tell them who my lawyer was or who my mother was. He said I couldn't see anybody. The next day after talking with Mr. Wheeler, I saw Mr. Cranford, the lawyer. I did not see

my mother. Mr. Cranford told me that my mother had been to see him. Up to that time I had refused to tell the officers even my name. I had made the confession before Mr. Cranford got there, about fifteen or twenty minutes before he arrived. The officer asked me to tell him about it, and I told him I might as well. They did not catch me in the act; I was in the yard, and that was just trespassing.

MR. BURGWYN: At the time you were in jail and these officers talked to you, you knew at that time, and I am not talking about what you heard since then, that they had caught you in the act and you were guilty and wanted to get it off your conscience?

WITNESS: At that time I did. I talked to Mr. Cranford after I made the confession. I was brought to Halifax jail and stayed there at least thirty days before I was tried. I did not get to see my mother until I came to be tried. I was told my mother and father and sister all came to see me, and they were told it wasn't visiting day. I did not tell anybody in jail that I wanted to see my people. I wrote and told my mother to tell my lawyer to get in touch with my people. The letter was mailed, but I don't know whether my mother got it. She didn't tell me whether she had gotten it after I saw her, because I had been in prison then and it was too late, and I wasn't thinking about the letter when I saw her at the time of the trial.

I don't remember your reading the bill of indictment or anything to me at the time at the time of the arraignment.

MR. BURGWYN: And I asked you how you would be tried and you said, "By God and my Country"?

WITNESS: I remember he told me something to say. I figured I was going to the penitentiary anyway and no use listening to the rest of it. I never pleaded not guilty to the bill of indictment. Mr. Cranford talked to me and my mother and told me what I was charged with, and if the jury found me guilty, the punishment was that I would be sent to the gas chamber. My mother and my lawyer talked with me about the case. I did not insist that Mr. Cranford pleaded me guilty. He said it was the best thing to do, and I pleaded guilty.

I don't remember getting up and getting sworn to answer any questions in the Court. When the Judge asked me how old I was, I said, "15."

MR. BURGWYN: You told him 16. How old were you?

WITNESS: 15. I was born April 28.

MR. BURGWYN: He read to you, "You have been charged with burglary in the first degree. You have been arraigned on that charge and have presented to me through your counsel a plea of guilty. Do you understand what you have signed?" and your answer was, "Yes, sir." The Judge asked you, "Do you understand since the State accepts the plea, the judgment of the Court is that you be imprisoned in the State's Prison for life?" and you said, "Yes, sir." Then the Court said to counsel, "These questions have no reflection on you." Mr. Cranford said, "I understand and want them to be asked." Then the Court asked you, "Has anybody made you any promise or forced you in any way to make this plea?" and you answered, "No, sir." The Court asked you what grade you were in and you said the ninth grade. "Have you passed all of your work up to the ninth grade? I want to find out your degree of intelligence," and you answered, "I didn't this year." "You failed this year?" "Yes, sir." "Is your mother sitting beside you?" "Yes, sir." "Did you sign this plea freely without any fear or compulsion?" "Yes, sir." "Has any person promised you anything if you do this?" and your answer was, "No, sir." "Do you understand you will be sentenced for the rest of your life in the State's Prison?" and your answer was, "Yes, sir." You remember those questions that were asked?

WITNESS: I remember most of them.

MR. BURGWYN: I ask you if your mother wasn't sworn and the Court asked her some questions as follows:

> "Mrs. Parker, mother of the defendant, being sworn, testified:
>
> Q Do you understand what he is doing?
> A Yes, sir.
> Q Is his father living?
> A Yes, sir.

Q Is he in court?
A No, he is out of town.
The Court finds that the prisoner under oath understands thoroughly the import of his plea and it is made freely and voluntarily."

What I have just read is true?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: I can't say whether this is all true, because I don't remember all of it. I do remember some of it.

MR. BURGWYN: I asked you if before you signed the plea of guilty that you were advised by Mr. Cranford of all your rights?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: Mr. Cranford didn't tell me anything about any rights. He asked me about the confession, and I told him I signed the confession. He said the best thing to do is to plead guilty, and I would get a life sentence out of it. I did not want to plead guilty. I wanted to get out of jail. I did not discuss this matter two other lawyers; they were there to sign that paper.

MR. BURGWYN: They were witnesses to the paper authorizing Mr. Cranford to make this plea in your behalf.

COURT: You say that is all the others did, just signed as a witness to your signature?

WITNESS: They didn't say anything to me. The other lawyers talked to Mr. Cranford. My mother was in the room. That is my signature on the plea of guilty. I don't know whether I signed what you have just read, but I know that is my signature on it. I don't recall whether this paper was read to me before I signed. I don't remember after pleading guilty and being sentenced, telling Mr. Cranford how much I appreciated everything he had done for me. I did not appreciate getting life in the penitentiary.

MR. BURGWYN: I ask you after you were in prison some thirty to sixty days if you didn't write Mr. Cran-

ford a letter telling him how much you appreciated what he had done for you?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 15.

WITNESS: I don't remember writing Mr. Cranford, either. I don't know if this piece of paper is my handwriting, because I have stopped writing and print. This signature favors mine, but I can't say that it is mine.

MR. BURGWYN: I read it to you, and this was written from Central Prison about one week after you were sent to prison:

> Dear Mr. Cranford: I received a letter from my mother and she told me what you said. We plan on following all the rules that they make before me. But anyway I am glad the placed me in prison because I was going to quit school and I know I would have got in some trouble. It's not all bad here. I get a chance to finish school. I suppose to go to Polk Youth Center and I can take a trade. And I am very sorry I caused you all the trouble at the trial. Oh they say be in Raleigh a while I suppose to see a doctor. They think I am crazy. Well I want to thank you for all you did for me.
>
> Charles Lee Parker

You wrote that letter, didn't you?

MR. SMITH: Objection.

EXCEPTIONS 16 and 17.

WITNESS: I don't recall.

MR. BURGWYN: At the time Mr. Cranford represented you and at the time you wrote this letter, I ask you this one question: were you not at that time completely satisfied with Mr. Cranford's representation of you in Court?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 18.

WITNESS: Other than about thirty days after I g[illegible] in the penitentiary, I thought he did the best he could. I don't recall writing that letter. I began to become dissatisfied when I talked to a boy and he said they gave me a raw deal. His name is Roy Bryant, and he is now out in the free world. A lawyer by the name of Haithcock wrote me from Alexandria, Va.

MR. BURGWYN: Where did you get to know him?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: My mother told me about him two years after I had been in prison. I have the names mixed up. Mr. Haithcock is the lawyer that wrote me about my case. I don't know who employed him.

MR. BURGWYN: Did you ever talk to him?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 19.

WITNESS: Yes, sir.

MR. BURGWYN: Where?

MR. SMITH: Objection.

EXCEPTIONS 20 and 21.

WITNESS: In the penitentiary.

MR. BURGWYN: After he wrote you, or before?

MR. SMITH: Objection.

EXCEPTIONS 22 and 23.

WITNESS: He came to see me and then wrote me.

MR. BURGWYN: Why did he come to see you?

MR. SMITH: Objection.

EXCEPTIONS 24 and 25.

WITNESS: I guess to help me. People in Halifax County did me so wrong.

MR. BURGWYN: For what?

MR. SMITH: Objection.

EXCEPTIONS 26 and 27.

WITNESS: Give me life sentence for what boys in other counties usually get five to six years for.

MR. SMITH: Motion by petitioner to strike.

COURT: Motion denied.

EXCEPTION # 28.

MR. BURGWYN: You went into a woman's home in the middle of the night, who didn't know you and you didn't know her, had intercourse with her and plead guilty to first-degree burglary?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 29.

WITNESS: Yes, sir. Mr. Cranford was employed by my mother. I was completely satisfied with his services up until the time I found out he had done nothing for me. He did not save my life; he took it. Before I signed my plea of guilty, I knew that I would get life sentence in the penitentiary. My parents tried to see me in jail.

MR. BURGWYN: Your father wasn't here at your trial. You were tried for your life and your father didn't have enough interest to come to Court?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 30.

WITNESS: My mother was here. I haven't learned anything since I've been in prison, except how to box. I was printing before I left the street.

REDIRECT EXAMINATION

I had psychiatric treatment at Central Prison. I am still receiving psychiatric treatments.

MR. SMITH: What kind of treatment?

WITNESS: They just ask me some questions.

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: I think I had three sessions with the psychiatrist.

MR. SMITH: Did the psychiatrist tell you you had any mental problem?

MR. BURGWYN: Objection.

WITNESS: He didn't say anything. He just ask me some questions. I did not request you as counsel.

MRS. VIOLA PARKER (sworn) testified for the petitioner as follows:

I am the mother of the petitioner. The petitioner was born April 28, 1949, in Halifax County. He had to have a birth certificate when he started to school. I did not recently get one.

MR. SMITH: Didn't you send me a copy of a birth certificate?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: Yes, I did send you a birth certificate. The certificate which you just handed me is the one that I sent. I got it from Mr. Wilson, the Register of Deeds.

MR. SMITH: Is the information contained on that copy correct?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: Yes, the information is correct.

MR. SMITH: I would like to introduce Petitioner's Exhibit 1, the birth certificate, into evidence.

COURT: ALLOWED.

WITNESS (continuing): On the night of Thursday, July 16, 1964, two officers of the Roanoke Rapids Police Department came to my house about twenty minutes before four A.M. I looked up at the clock. They said they had picked up Charles. I said, "Where?" He said, "Over in the park." I said, "For what?" He said, "Peeping Tom," and that they were holding him for something else. He said he didn't know what right then. I said, "I might as well go to the station." He said, "No need for you to go. They won't let you see him." They said they picked him up at 10:30.

I saw my son the last time at home eating supper. He took a bath, put on clean clothes and looked at TV a while. I don't know exactly what time he went out. I did not go to Halifax County jail to see my son while he was there. When I said I would go to the police station, the officer said there was no need to go. After it got light, we went to the lawyer's office. We wanted to see Mr. Richard Allsbrook, but he wasn't there. His mother was in the hospital, and we talked to Mr. Cranford.

I did not go down to the Halifax County jail to see my son while he was there, because I was expecting to go to the hospital. I went to the hospital on July 21, and had a baby. I sent my daughter Doris Jean to go to the jail. I remember being in one of the rooms adjacent to the courtroom at the time of Charles' trial. Before they brought Charles up, Mr. Cranford talked with us and told Charles the best thing to do was to go on and confess. I asked him if he could get an appeal. He said if he got an appeal he would get the "chair" and said the best thing to do was to confess. He went down and had the paper typed up and came back, and we read it. I said, "Can we get an appeal?" He said, "He will get the chair if he does." He said the best thing was to sign the paper. I think Charles signed it first and then I signed it. He went and got two other people to come in and sign the paper. They didn't say anything but just signed it. He said, "Let me get two witnesses," and he brought them in.

CROSS EXAMINATION

The police said there was no need to go to the Roanoke Rapids police station jail. After we talked to Mr. Cranford, he called the jail, and they said they were fixing to take him to Halifax. After that, I went to the hospital. I stayed in the hospital two or three nights. I didn't go to the jail from the 24th or 25th of July until August 12th because I don't get out too early with a young baby. My baby was almost a month old when I came to the court. I sent my daughter to the jail. I sent my son food, clean clothes, and a little bit of change. My boy was fifteen years old. I told the Judge how old he was. They had on the paper that he was sixteen, but I told them he was fifteen. Mr. Cranford said, "Let me change this," and he drew a line over the sixteen and put fifteen on the top.

The night they picked Charles up, everybody was home except Charles. He was sleeping on the front. Charles and Allen were together; Allen was there and I thought Charles was too. When Allen came in, I asked him where

Charles was, and he said, "Out there." I thought he was home at four o'clock in the morning.

MR. BURGWYN: All through this trial at that time, you were completely satisfied with Mr. Cranford's representation of your son?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 31.

WITNESS: I didn't know anything. I wasn't satisfied, but there was nothing I could do and if I could have gotten out and got a lawyer, I wouldn't have had Mr. Cranford. I would have hired someone else. I did hire him. The Judge didn't ask me anything except that if I was Charles' mother. I don't remember the Judge asking if his father was living. Charles' father was working; I remember Mr. Cranford asking me that. I don't remember the Judge asking me anything except whether I was Charles' mother. I told the trtuh, and I did not try to hide it. If the Judge asked me where Charles' father was, I don't remember it.

MR. BURGWYN: After the case was over and your son was in prison, I ask you if you haven't talked to Sheriff Daniels on one or two occasions, and told him how happy you were that things turned out as they did?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 32.

WITNESS: No, sir. Charles was sentenced on Tuesday like of this past week and the following Monday I was downtown. I had been to Mr. Cranford's office to pay him what little money I had. I came back and stopped at Star Furniture Company. I was standing there and Mr. Daniels passed me and didn't speak and went on and then came back and talked to me about fifteen minutes. He asked me how Charles was and thought he would get a good education. He said Charles was a good boy and just got with the wrong crowd. He said that he was glad he was getting on all right. I said I hoped he would be all right. He said he could go to college. I did not say to the Chief of Police that I was dissatis-

fied with Mr. Cranford. Nobody has asked me whether I was dissatisfied or pleased with anything that happened in this court. I did not feel that Charles got justice. Nobody asked me. I have not been to anybody and complain. I have not been to you as the Solicitor, or to Judge Hubbard, the trial Judge. I did not write Mr. Cranford and tell him I was not happy. Charles told told Mr. Cranford that he hadn't done anything for him in that little room, and I said, "Charles, don't say that." And he began crying. I didn't want Charles to talk to him like that. I did not hear those lawyers who came in and witnessed my son's plea of guilty ask him anything. I signed the guilty plea because I didn't know any better. Mr. Cranford said it would be better if we did sign the guilty plea. I asked him if we could appeal and he said no, that if he got an appeal he would go to the chair and I thought it would save his life, and I hope to get him a parole, and when I asked about appeal, he said, "He will get the chair." I did see Sheriff Daniels in front of Moody Hedgepeth's store in Roanoke Rapids and said, "Sheriff Daniels, the next time you are in Raleigh, I hope you will go by and see Charles." And I asked the Sheriff to tell him to behave himself and be a good boy because we want to try to get him out as quick as we can and if he doesn't stay too long it will be the best thing that ever happened to him.

MR. BURGWYN: I ask you if your son didn't tell you in the presence of Mr. Cranford that he had been to this house on this night in question, had intercourse with this woman he didn't know and went in against her will?

MR. SMITH: Objection.

EXCEPTIONS 33 and 34.

WITNESS: He didn't say against her will. Mr. Cranford asked him if he had ever been there, and he said yes. I said, "It is hard for me to believe Charles went in there because he don't pay no girls any mind and it is hard to believe that."

FRANK D. WILSON (sworn) testified for petitioner as follows:

I am the Register of Deeds of Halifax County. The jury list is typed in my office. The jury has been up to now selected by the County Board of Commissioners, of which I am the Clerk. I am familiar with the way the grand jury is selected; it is selected in the Clerk's Office from the list drawn by the County Commissioners.

COURT: The Court will take judicial notice that all grand juries in the first division of the Superior Court of North Carolina over, through and which this presiding officer has been traveling for fifteen years have always and invariably been selected in open court from the jurors drawn at the appropriate time by the placing of all names in a hat and the grand juries are drawn out by a child under ten years of age, seated in the box, duly sworn, empaneled and charged by the presiding officer, and this presiding officer has never, during the fifteen years he has been serving on the Superior Court bench of North Carolina, known a grand jury to be selected in any other manner.

WITNESS (continuing): I am familiar with the manner in which the jury lists are prepared. These lists are used both for grand and trial juries. As to the manner in which the lists were prepared that go into the jury box, during the summer of 1964, the commissioners, who are elected from districts, were taking the tax records of those districts and checking the names according to the General Statutes of North Carolina, selecting men known to them to be of moral character, never convicted of a crime and of sufficient intelligence to serve on either the grand jury or the petit jury. They selected the names from the tax rolls. My office types those names on which they have made a distinctive mark on the tax scroll. These are typed in duplicate. One copy is cut in little strips and put in the jury box; the other showing the number and township goes in a book. In 1964 these tax lists were kept on a segregated list in each township, white and colored. The little distinctive marks made on each page of the tax roll indicating people selected by the Commissioners to serve on the jury remain on the

tax roll indefinitely. The grounds on which the Commissioners made their determination was personal knowledge of the individuals to be selected.

MR. SMITH: Although they knew they would reject those who—

MR. BURGWYN: Objection.

COURT: Your only duty is to copy the names they designate?

WITNESS: That's right. I will say every two years when the jury box was filled the County Commissioners published a copy of the General Statutes with the procedure set out and that to be used. They had to be of sufficient intelligence to serve on a jury.

COURT: Objection is sustained, unless the witness knows what the Commissioners did.

MR. SMITH: Do you know what the Commissioners did?

WITNESS: I don't know exactly.

COURT: If he knows what the Commissioners were thinking about.

MR. SMITH: What are the statutory methods that the Commissioners followed?

WITNESS: The General Statutes of North Carolina.

MR. SMITH: What is your understanding of the procedure they used based on the statute?

MR. BURGWYN: Objection.

COURT: Sustained.

MR. SMITH: Is one of the procedures that the Jury Commissioners use, to ask acquaintances of theirs, or friends of theirs, who they knew among the names?

WITNESS: I don't think that is correct. The County Commissioners have on occasions asked deputy sheriffs or the tax collectors, who know more people than they do, as to their qualifications for jury duty.

MR. SMITH: These practices you describe, would they persist over the five- or six-year period before 1964 —from 1960 to 1964?

WITNESS: Yes.

MR. SMITH: You know when the recent addition to the courthouse was constructed?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: It has been in the last couple of years.

COURT: It went in use sometime after 1963.

WITNESS: Before that time there were very few women who sat on jury duty, because there were no toilet facilities available in the courthouse.

MR. SMITH: The County has recently revised this jury roll?

WITNESS: Yes, within the last year.

MR. BURGWYN: Objection.

THE STATE: Sustained.

EXCEPTION # 35.

MR. SMITH: Describe the manner in which this jury selection procedure was changed. Did the jury roll process change after 1964?

MR. BURGWYN: Objection.

COURT: You said it was the same system from 1960 to 1964. He wants to know if there are any changes, or did it remain the same until 1967?

WITNESS: Yes, it has changed. The last selection of jury was entirely mechanical. That is, they didn't use the tax scrolls. They used the voter registration books, the ones that voted in the last preceding general election and every fifth and sixth name was listed.

COURT: Was that done under the law passed at the last Legislature? The reason I ask is it is very similar to the present provision for selecting a jury as advocated by the department of administration.

WITNESS: It was done by recommendation of the Attorney General.

MR. SMITH: It was recommended on February 14, 1967.

WITNESS: Yes, sir.

MR. BURGWYN: Objection and motion to strike.

COURT: Sustained, and motion to strike allowed.

MR. SMITH: You know how many people serve at a time on grand juries in Halifax County?

MR. BURGWYN: Objection.

COURT: Sustained. Eighteen serve at a time.

MR. SMITH: Will the Court take judicial notice that nine new members are selected each six months?

COURT: That is true. All counties in the eastern part of the State don't do that. If I make no mistake, one or two small counties, where they have only one criminal term in the spring season and one in the fall, they select a new grand jury at each criminal term.

MR. BURGWYN: What we want is for you or somebody under you to prepare a list of everybody drawn on petit juries from 1960 through August Court, 1964.

WITNESS: Wouldn't the whole jury list give you that information?

MR. BURGWYN: That is what we want, but we want it by race.

MR. WILSON: There is no way of telling from the jury list.

MR. BURGWYN: Somebody will have to look it up. It will show from the tax books for the year they were drawn. It will take time, but I imagine it will be done.

STIPULATION BETWEEN THE SOLICITOR FOR THE STATE AND THE COUNSEL FOR THE PETITIONER: The United States census for Halifax County for the year 1960 can be introduced in evidence by stipulation, and in regard to the percentage of the races in Halifax County on said date it is also stipulated that for the year 1960 tax levy Halifax County showed approximately 11,000 whites and approximately 7,000 colored, and the 1964 tax levy shows substantially 11,000 whites, 7,000 Negroes, and 129 other.

MISS DORIS JEAN USSERY (sworn) testified for petitioner as follows:

I am a sister of the petitioner. While my brother was in Halifax County jail during the latter part of July or early part of August, 1964, I attempted to visit him. I did so on more than one occasion. The first time I came here to visit him was on Thursday, and I went inside. I think Mrs. White let us inside. I asked if I could see

Charles Parker. She told me I could not. The first time I came down here, Mrs. White wasn't in. A colored lady was working at the desk and asked me what I wanted. I said I wanted to see Charles Parker. She said nobody was there to let me see him, and I would have to go to the Sheriff. I did go to the Sheriff's office, but the Sheriff was not there, and a lady working there, a secretary I reckon, said she wanted to pass a couple of words about why I wanted to see him and who I was. Every time I came to see him, I brought some money or clothes and left these things with somebody at the jail.

I live in Roanoke Rapids. On the second time I came to see him, it was on a Sunday. Some of Charles' friends brought me down here and hoped that they could see him also. The jailer, or Mrs. Whitehead, or whoever she is, was sitting on the lawn in front of the jail on a chaise lounge with shorts and a halter on. I asked if I could see him. She said it was too late, that the hours for visiting were over. I told her that I had money and food for him, and she told me to go inside and put it on the desk.

I tried to see him a third time, but every time I came I was too late or it wasn't visiting day. I did call down in advance, and asked what time visiting hours were, and they told me the visiting hours were from 1:00 to 4:00. I don't know who I talked to, but it was a lady's voice. I called to the County jail, and talked to somebody who answered the County jail phone. It was that person who told me the visiting hours were from 1:00 to 4:00. And I did come down during that time. I was told that I was too late or that it wasn't visiting day. Every time I came it was before 4 o'clock. The only other members of petitioner's family who came with me on these occasions was my little sister.

CROSS EXAMINATION

The Sheriff or Jailer told me the only visiting hours were on Thursday. I did come on Thursday, the second Thursday in the month of August, if I am not mistaken. That was not after he was tried. I also came down here

on the Thursday right after they had brought him down to the jail. They told me it was a visiting Thursday. I don't know whether it was the second Thursday and every Sunday that was visiting day. I came down here on Sunday. I did not see him. I don't know exactly what time I got here, but I know it wasn't after 4 o'clock. I always left home at two or a little after two and it didn't take long to drive down here. I never went in after four. My father did not come down here.

MR. BURGWYN: Did your father ever attempt to visit his son?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION # 36.

WITNESS: My father was working. At that time I was pregnant and was not working. Friends brought me down here. We did not ride around all afternoon; we would come straight down here.

COURT: The Court adjourns the taking of evidence in this action until ten o'clock Tuesday morning, December 19, 1967, for the primary purpose, among others, to allow the petitioner to secure certain information from the office of the Register of Deeds and the tax office of Halifax County, which is not available at this time.

The hearing of the case was resumed on Tuesday morning, December 19, 1967, at 10:00 o'clock, at which time the following proceedings were had.

MRS. VIOLA PARKER (RECALLED) testified for petitioner, as follows:

I remember the birth certificate which was introduced as Petitioner's Exhibit 1 the last time.

MR. SMITH: You testified you secured that from the Register of Deeds Office. The petitioner's name is Charles Parker. The name on the birth certificate was

Charles Ussery. Is there any explanation for the difference in his name and the name on the birth certificate?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: He is going on his father's name now. The name "Ussery" is my maiden name.

MR. SMITH: This child was born prior to your marriage?

MR. BURGWYN: Objection.

COURT: OVERRULED.

WITNESS: Yes, that's right.

FRANK D. WILSON (RECALLED) testified for the petitioner as follows:

Since the previous hearing in this case, I have performed certain examinations of the records of juries in this county. We checked all the jurors that have been drawn by the Board of County Commissioners during this period, and they total two thousand nine hundred and fifty-four.

MR. BURGWYN: Objection.

COURT: Overruled. That is over what dates?

WITNESS: January, 1960, through August, 1964. The total number of jurors on all venires was 2,954.

MR. SMITH: Did you determine what the respective races were?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: To the best of my ability, yes. Of the white race there were 2,820.

MR. SMITH: How many did you find to be colored?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: 134 were colored.

MR. SMITH: Were those colored all Negroes?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: I imagine so. I don't know.

MR. SMITH: Do you have any kind of listing you made which contains this information?

MR. BURGWYN: Objection.

COURT: He has testified as to white and colored.

MR. SMITH: He has a sheet of paper which shows the number of each of these drawings.

MR. BURGWYN: Objection.

COURT: You want the number of whites and the number of colored?

MR. SMITH: Yes, sir. He has a list which shows by venire and we think it should go in the record.

COURT: Objection is sustained. If you want the one for this particular term of court, August, 1964,—was he indicted at the August Term, 1964?

MR. SMITH: Yes, sir.

COURT: I will allow him to state that it is from the petit jury because the grand jury was taken from the petit jury and the first criminal court after July 1 the Court takes judicial knowledge that they select nine each six months.

WITNESS: I have them as they were selected for the Grand Jury in August, 1964. You want the number of whites drawn for the August Term, 1964, petit jury?

MR. SMITH: Have you checked on the composition of the Grand Jury of August, 1964?

MR. BURGWYN: Objection.

COURT: Overruled.

WITNESS: Yes. Nine were drawn, eight white and one colored.

MR. SMITH: Did you also check on all the grand juries drawn during the period January, 1960, through August, 1964?

WITNESS: 99 were drawn during the period. 91 were white and 8 were colored.

CROSS EXAMINATION

No names drawn from the jury box were discarded because of race. There was nothing on the list that came from the jury box to indicate race. The only thing on the slip in the jury box is the name and number.

MR. BURGWYN: You know how these names were selected to go in the jury box?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: They are selected by the County Commissioners. The list as drawn by the County Commissioners were typed in duplicate, one of which was cut in strips showing only the number and the name, and the other one shows the township from which they come. They were selected by the County Board of Commissioners to go into the jury box.

MR. BURGWYN: Do you know from what source they come?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: They come from the tax records. I was present at the time the names were selected.

MR. BURGWYN: Were any names kept off the jury list because of race?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: No names were kept off the jury list because of race. I think the Commissioners are very conscientious about selecting. The law says they shall select men of good moral character, or persons of good moral character, who have never been convicted of crime involving moral turpitude and are of sufficient intelligence to serve on a petit or grand jury, and they had to select people they knew. I think the Commissioners have been very conscientious.

REDIRECT EXAMINATION

All these Commissioners were white people. They naturally would know more white people and know more about the white people in the community than they would Negroes. I think that many Negroes were left off the list because the Commissioners didn't know anything about them, didn't know whether they were fit to serve or not.

RECROSS EXAMINATION

Also numerous white people were left off. These Commissioners were duly elected by the people of Halifax County under the election law.

STIPULATION BY THE SOLICITOR FOR THE STATE AND THE COUNSEL FOR THE PETITIONER: The signed stipulation based on the contents of the records of the 1960 Census of Halifax County may be introduced in evidence as Petitioner's Exhibit 2.

HUBERT M. BLALOCK, JR. (sworn) testified for petitioner as follows:

I live in Chapel Hill. I am employed by the University of North Carolina in the Sociology Department as a teacher of statistics. I have an AB degree from Dartmouth, an MA degree from Brown University, and a Ph.D. degree from the University of North Carolina.

MR. SMITH: What are these degrees in?

MR. BURGWYN: Objection.

COURT: Mr. Smith, what is the purpose of calling this witness?

MR. SMITH: The petitioner has called this witness for the purpose of having him qualify as an expert in statistics, and have him testify as to the statistical probabilities of arriving at a racial distribution of grand jurors in Halifax County on a random or other unbiased basis, which is identical to the actual racial distribution of grand jurors during the term of court at which the petitioner was indicted and for all of the grand juries impaneled during the period from January 1960 to the time of the petitioner's indictment, and also this distribution for all jury lists drawn by the Jury Commissioners during this period.

COURT: This kind of testimony is not competent. I will sustain the Solicitor's objection. Testimony of prob-

abilities has no place in a co urtroom. When you talk about probabilities, you are tal king about gambling. This man is a gambler. He might as well go to Las Vegas and make his living there.

MR. SMITH: The petition er requests leave of the Court to place the testimony of the witness on record, so that it can be preserved for appeal.

COURT: I will deny that request. You may prepare an affidavit of his testimony, and if it is satisfactory to me, I will allow it to be place d in the record.

EXCEPTIONS 37 and 38.

MR. SMITH: The petition er offers as evidence PE-TITIONER'S EXHIBIT 3, which is an abstract of the records of the Central Priso n Hospital pertaining to petitioner, signed by the assis stant medical director.

COURT: Allowed

MR. DWIGHT L. CRANF ORD addressed the Court as follows:

My name is Dwight L. Cr anford. I represented the petitioner at the August Ter m, 1964. I am present in Court and have my file with me and would like to tender myself to the petitioner's at torney for examination or cross-examination. I have not been subpoenaed.

MR. SMITH: I don't care to examine Mr. Cranford on direct examination.

PETITIONER RESTS.

STATE'S E VIDENCE

DWIGHT L. CRANFORD (sworn) testified for the State as follows:

I am an attorney. I went to undergraduate school at the University of North Caro lina, finishing in 1954, and

went to law school at the University of North Carolina, finishing in 1960. I have been practicing in Roanoke Rapids since Labor Day, 1960. I represented Charles Lee Parker in 1964 on a charge of first-degree burglary. I was employed by his mother and father the morning after he was arrested in July, 1964. I talked to Charles Lee Parker the same morning I talked to his mother and father. I went to the police station and talked to him. That was the morning after he was arrested the night before. I talked to Mr. Reuben Daniels, Chief of Police of Roanoke Rapids, by telephone while Charles Parker's mother and father were in my office. I don't remember whether I told Mr. Daniels that his mother and father requested me to represent him. He called to see if I would represent him. I understood the Chief knew they were in my office.

MR. BURGWYN: At the time the mother and father talked to you, did either the mother or father complain to you of any treatment their son had received the night before?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION #39.

WITNESS: I don't recall specifically. They told me the boy had been arrested and they understood he was charged with being a Peeping Tom. Of course, at that time they didn't know a great deal about it. I went and talked to Charles Lee Parker in the municipal building in Roanoke Rapids. No one else was present when I talked to him.

MR. BURGWYN: Will you relate to the Court the gist of that conversation?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: I talked to Charles about what he was charged with and I didn't go in great detail. At that time, he was not technically charged, but they said he would be charged with first-degree burglary. He told me he had made a confession to the police officer. I can't say whether he told me that they had advised him of his rights. I questioned him primarily at to whether or not

he was threatened in any manner, whether any promises were made to him and whether he was scared at the time he made the statement. He told me no threats had been made and no promises had been made, and he said he was not scared. That was before the MIRANDA decision. I tried to find out what we were faced with in a hurry. He was later placed in the Halifax County jail. I went to the Halifax County jail to discuss the case further with him.

MR. BURGWYN: Did you discuss all the possibilities of his case with him?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: I can't say that I can answer that. I talked with him primarily on the basis of what he had told me about the situation, what he had told the police officers and what the possible consequences were and all the avenues of handling the case. After discussing with him and his mother, he asked me to plead him guilty. His mother was present on the 17th and 18th of August.

COURT: Do you recall approximately how many times you visited him after he was brought to Halifax County jail?

WITNESS: I don't recall specifically. Not more than once or twice.

COURT: That was prior to the 17th and 18th of August?

WITNESS: Yes, sir. I spent most of the day of the 17th and 18th of August in one of those side rooms with him and his mother. He and his mother requested that I plead him guilty. I had an affidavit signed by his mother. I have the original, which is as follows:

> "I, Viola Parker, mother of Charles Lee Parker, do hereby state that I know and understand the nature and seriousness of the charge of first degree burglary which is now pending against my son, Charles Lee Parker. I have talked with Dwight L. Cranford, my son's attorney, and he has talked with my husband who is not present at this term of court. I have also talked with my son about this whole matter. After full discussion and consideration I hereby

consent to my son pleading guilty to the charge of first degree burglary and I understand that in case of such plea my son will be sentenced to life imprisonment.

This the 18 day of August, 1964.

(Signed) Viola Parker"

Charles Lee Parker was present when his mother signed the affidavit. It was right after he had signed his statement. His statement was as follows:

"I, Charles Lee Parker, age fifteen, do hereby state that I am aware that I am presently charged with first degree burglary and will probably be tried at the August, 1964, term of Superior Court of Halifax County. My attorney Dwight L. Cranford has explained to me the nature and seriousness of this charge. I know this is a capital case. I also know that if I plead guilty I will be sentenced to life imprisonment. I have not been threatened or abused in any manner by any person and no promises have been made to me if I plead guilty to any charge. My lawyer has discussed this matter with me and with my mother and I understand he has discussed it with my father. After discussing the matter with my attorney and after consideration I hereby authorize, direct and request him to enter a plea of guilty to first degree burglary on my behalf at the August Term, 1964, of Halifax County Superior Court, realizing that I will be sentenced to life imprisonment.

This 18 day of August, 1964.

(Signed) Charles Lee Parker"

Then we came into Court and he pleaded guilty. His plea was accepted by the State. He was sentenced to life imprisonment.

MR. BURGWYN: At that time, had you been paid your full fee?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION #40.

WITNESS: Not the entire amount.
MR. BURGWYN: Did you at a later date receive a letter from Charles Lee Parker in prison?
MR. SMITH: Objection.
COURT: Overruled.

EXCEPTION #41.

WITNESS: I did.
MR. BURGWYN: Read the letter.
MR. SMITH: Objection.
COURT: Overruled.

EXCEPTION #42.

WITNESS: This is on prison stationery, and it is as follows:

"Dear Mr. Cranford:

I received a letter from my mother and she told me what you say. What I plan on following all the rules they place before me but in a way I am glad the place me in prison because I was going to quit school and I know I would have got in some trouble. It's not all bad here. I get a chance to finish school. I suppose to go to Polk Youth's Center and I can take a trade and I am very sorry I caused you all the trouble at the trial. Oh they say be in Raleigh a while. I suppose to see a nut doctor. They think I am crazy. Well I want to thank you for all you did for me.

(Signed) Charles Lee Parker"

This letter was dated about two weeks after he was tried. I never saw his father after the trial as I recall. I talked to his mother between the trial and when I got that letter. At that time I suppose I did most of the talking; I told her to encourage Charles to make the best of prison and to try to go to school and I thought he would be out before he was 30.
MR. BURGWYN: Did she complain to you about your representation or handling of the case?
MR. SMITH: Objection.
COURT: Overruled.

EXCEPTION #43.

WITNESS: She did not. She thanked me.
MR. BURGWYN: Did she finish paying you your fee?
MR. SMITH: Objection.
COURT: Overruled.

EXCEPTION #44.

WITNESS: She paid me some more on it but never completed paying it. She did pay through November. I know of nothing else I want to tell the Court. I explained to the petitioner fully of the crime with which he was charged and the consequences thereof. In my opinion he fully understood what was explained by me, in the presence of his mother.

MR. BURGWYN: The State offers in evidence as State's Exhibit 1, the statement of Viola Parker, as State's Exhibit 2, the statement of Charles Lee Parker, and, as State's Exhibit 3, the letter from Charles Lee Parker to Dwight L. Cranford.

COURT: Allowed.

EXCEPTION #45.

WITNESS (continuing): After he pleaded guilty His Honor asked him some questions. At the arraignment, when they said, "How will you be tried?" I had to say, "By God and my Country," because he had no way of knowing how to answer that question.

CROSS EXAMINATION

I advised the petitioner that if he didn't want to plead guilty he should tell me before we came out to the courtroom because the Judge was going to ask him if it was his decision, and, if it was not, for him to tell me that it was not. I did not discuss the series of questions with him that the Judge would put to him. There was some confusion as to whether the defendant was fifteen or sixteen years of age. The affidavit I prepared said he was fifteen; that is what he told me. I don't recall attempting to correct some of the court records and suggesting that sixteen be marked out and fifteen put in its place. I don't know what time he was sentenced on the guilty plea. I don't remember whether it was before or after lunch.

I remember talking with the petitioner in July and informing him that court would be the next week and his mother would be here the next week and his father, I thought, and we would have an opportunity to get together before his trial. I don't have a time record that would reflect when I came. I don't keep time records except on insurance cases. I remember that I talked to the defendant at the Roanoke Rapids Police Station between 9:30 and 10:30, because I left my office immediately after I finished talking to his mother and father, and they were waiting in the office when I got there that morning.

In his letter the defendant, when he apologized for all the trouble he had caused at the trial, was referring to the time just after the sentence when we went in that side room, he and I and his mother, and another lady who was related to him. I talked to him briefly about the sentence and then gave his mother and the other lady an opportunity to say good bye to him. They became emotional. Charles was trying to keep them from being emotional. Charles started to the door to go into the courtroom. He was about to break down and his mother and the other lady stepped in front of him to prolong the good-bye. He wheeled around towards the other side of the room. I was afraid of what he would do and I called the Deputy Sheriff to come, and he and another man came and brought him back in the courtroom.

I explained to him that in the event he was convicted in a jury trial, he would receive the death sentence unless the jury recommended mercy. I told him that by pleading guilty he would get a lighter sentence. I advised him that to plead guilty was the better of the two courses to take. But I don't advise him that that was the only course; I told him the choice was his and his family's.

I don't specifically recall that I discussed with him at all whether or not the law would permit me to keep his confession out of the evidence. It was my general practice then—practice has changed since the MIRANDA decision—to tell any defendant who confessed that there was a possibility of keeping the statement out. I did know that if we didn't keep it out, he was sunk. The

ESCOBEDO decision was decided at the June Term, 1964, but whether I had read it at that time I don't know.

I did not discuss with the defendant the racial make-up of the grand juries in Halifax County. I did not discuss with him the possibility of quashing the bill of indictment; in the light of what he told me and the officers, I didn't see that it would serve any purpose.

REDIRECT EXAMINATION

I knew that he was caught on the front porch of the house. He told me he was on the front poor. The officers say he had his hand on the door. I understood that he was caught at the house he was accused of breaking in.

COURT: Was it your understanding that he was caught at the house subsequent to the time he was accused of breaking and entering and, I believe, rape?

WITNESS: Yes, sir, several days later.

MR. BURGWYN: That was the same house he had broken in before?

MR. SMITH: Objection.

EXCEPTIONS 46 and 47.

WITNESS: That was my understanding. I don't recall if that is what he told me.

CLARLIE D. CLARK, JR. (sworn) testified for the State as follows:

I am an attorney in Roanoke Rapids, N. C. I finished law school in 1953. I actually started practicing law in Halifax County in 1956. I witnessed the signature of Charles Lee Parker on a statement he made authorizing Mr. Cranford to plead him guilty of burglary in the first degree. I did not witness a conversation between Mr. Cranford and the defendant. I had a conversation with him myself. His mother was present.

MR. BURGWYN: What was it?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: Mr. Cranford came out of the room and asked me to witness the signature of Charles Lee Parker. I went in the room. I am not sure whether Mr. Cranford asked him any questions after I arrived, but I know I did. I wanted to be absolutely certain this boy knew what he was doing and the consequences of his act. For that reason I inquired of him, and I don't recall the specific questions, but did he know what he was doing and that it would give him life imprisonment and his answers were in the affirmative. His mother was in the room. I don't recall whether I asked her any questions, but I do know the whoam who I understood was his mother was present. He did sign it, and acknowledged his signature in my presence. Neither he nor his mother complained of any treatment he had in Court or before the trial.

CROSS EXAMINATION

There was no trial; this conversation with him was before the entering of the plea of guilty. No one asked me to ask those questions to the defendant. I did this just as a member of the Bar. I feel that any time a defendant has authorized his attorney to enter such a plea, the defendant should be aware of what the situation is. I know Mr. Cranford to be an excellent attorney and I know there are occasions when the defendant will come back and attack the attorney, and I asked such questions on my own.

MR. SMITH: There was no suggestion in this proceeding that Mr. Cranford was an incompetent attorney, was there?

WITNESS: I haven't read the petition. I did not discuss with the defendant any confession he had made to the police. I did not discuss with the defendant the constitution of the grand juries of Halifax County.

REUBEN DANIELS (sworn) testified for the State as follows:

My name is J. R. Daniels. I am Sheriff of Halifax County. In July, 1964, I was Chief of Police of the City

of Roanoke Rapids. At that time, Charles Lee Parker was arrested and placed in my jail.

MR. BURGWYN: At that time that he was in your custody or under your supervision, and up until the time he plead guilty in Halifax County Superior Court, did Charles Lee Parker, his mother, Viola Parker, or any member of their family, complain to you about any treatment Charles Lee Parker received after he was arrested?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION #48.

WITNESS: No, sir. I have talked to his mother since he was tried. I have not talked to the defendant after he was tried.

MR. BURGWYN: In your conversation with his mother, after he plead guilty, did she complain about any treatment?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION #49.

WITNESS: No, sir.

MR. BURGWYN: Did she make any statement to you?

MR. SMITH: Objection.

COURT: Overruled.

EXCEPTION #50.

WITNESS: Viola has talked to me three times to my knowledge that I would see her on the street, about Charles Lee, and each time she has told me how well he was getting along in prison and I believe at one time she told me he was going to school regular and was a member of the boxing team and got along real good and, if it weren't for the fact that he would have to stay away so long, it was the best thing that ever happened to him. I said, "There is a probability if he behaves himself, he won't have to stay away too long." She asked me if I ever went to the camp where he was, to stop and talk to him, and I told her I would.

MR. BURGWYN: Was this defendant caught in the act of the crime he was charged with?

MR. SMITH: Objection.
COURT: Overruled.

EXCEPTION #51.

WITNESS: No, sir.
MR. BURGWYN: Was he caught at the house that he had previously broken in or was charged with?
MR. SMITH: Objection.
COURT: Overruled.

EXCEPTION #52.

WITNESS: The same house, yes, sir.
MR. BURGWYN: Was he caught by a police officer?
WITNESS: Yes, sir.

CROSS EXAMINATION

I did not participate in the interrogation of the defendant.

EVIDENCE CLOSED.

IN THE SUPERIOR COURT OF HALIFAX COUNTY

[Title Omitted in Printing]

STIPULATION

IT IS STIPULATED by and between the petitioner and the State of North Carolina that the following population characteristics of Halifax County are derived correctly from the 1960 Census, from sources printed in Tables 27 and 28 of the U. S. Bureau of the Census, THE U. S. CENSUS POPULATION: 1960, GENERAL POPULATION CHARACTERISTICS, NORTH CAROLINA, Final Report PC (1) B, U. S. Government Printing Office, Washington, D. C., 1961:

Categories	Numbers	% Total by Race
White Male	12,845	44.7%
Negro Male	15,869	55.3%
White Female	13,647	45.9%
Negro Female	16,057	54.1%
Total White	26,492	45.3%
Total Negro	31,926	54.7%
White Male 21 and over	7,846	53.9%
Nonwhite *Male 21 and over	6,710	46.1%
White Female 21 and over	8,650	55.1%
Nonwhite *Female 21 and over	7,056	44.9%
Total White 21 and over	16,496	54.5%
Total nonwhite* 21 and over	13,766	45.5%

*Nonwhite are Negro, except for 274 Indian (assuming 51% of the 537 Indians in the county are 21 years old and over, as is true of the general population) and 1 Japanese. Thus Negroes represent 98% of the nonwhite figures.

/s/ NORMAN B. SMITH
Attorney for Petitioner.

/s/ W. H. S. BURGWYN, JR.
Solicitor of Third
Solicitorial District.

PETITIONER'S EXHIBIT 3

ABSTRACT OF RECORDS
CENTRAL PRISON HOSPITAL ON

PATIENT: Charles Lee Parker
NUMBER: 20449-42
DATE: 15 Dec 67
RACE: Colored
SENTENCE: Life
HOSPITAL NO: .....
WORK RATING: .....

As Requested by: Norman B. Smith, Attorney-at-Law, Suite 700, Greensboro, N. C.

COMPLETE—PARTIAL MEDICAL RESUME

Review of this patient's medical folder indicate no significant medical treatment except fitting for glasses, one dental appointment, and normal chest X-ray.

Psychiatric examination performed by Dr. J. F. Owen, September 10, 1964, and August 31, 1964, are summarized as follows:

On September 3, 1964, psychological studies were done in the case of this patient and these studies revealed the fact that he has a full scale IQ of 104 and a total achievement level of 5.1. Patient, therefore, functions at a normal level of intelligence, but his retention of school knowledge does not compare very favorably with his advantages.

The MMPI results are as follows: 'The profile is moderately sociopathic. There are no signs of anxiety. The patient apparently has no feelings of guilt or remorse over his behavior. There are no indications of sexual disorder. His development in this area appears to be within the normal range for a boy of his age. The schizophrenic sub-scale not associated with psychosis imply an uninhibited individual who makes little effort at controls. The reading on the prison adjustment scales underscore this contention as they imply that the patient could be easily swayed into behavior which would be in conflict

with institutional controls. There certainly are no moral inhibitions which would prevent the patient from becoming involved in any direct behavior pattern that presented itself as a means of securing his immediate goals. There are no signs of psychosis."

The examination of September 10, 1964, "It seems to this examiner that we are here concerned with a person who is a social rather than antisocial. He obviously has no inner restrictions or controls to prevent antisocial and criminal behavior. Being limited, he responds only to external controls. He is lacking in ideals and principles and appreciation for social needs. It seems that his ambition is dependent entirely upon the pattern which he develops to satisfy his needs and desires, irrespective of the consequences. One of the most distressing manifestations shown by this youth is the lack of the powers of inhibition. This would lead one to feel that he is likely to enter into activities quite impulsively even if it required aggressiveness to accomplish his purpose.

DIAGNOSIS: PERSONALITY PATTERN DISTURBANCE, INADEQUATE PERSONALITY.

These excerpts of this patient's records are taken by Dr. Eugene Ruble, MD, from a report by Dr. J. F. Owen, MD, Psychiatrist.

EUGENE RUBLE, MD
Assistant Medical Director

IN THE SUPERIOR COURT OF HALIFAX COUNTY

[Title Omitted in Printing]

STIPULATION OF COUNSEL

IT IS STIPULATED AND AGREED by and between the counsel for the petitioner and the Solicitor that State's Exhibits 1, 2, and 3 shall not be attached to the case on writ of certiorari, because they were read verbatim into the record and were brought forward verbatim into the narrative part of the case on writ of certiorari.

IT IS FURTHER STIPULATED AND AGREED by and between the counsel for the petitioner and the Solicitor that petitioner's Exhibit 1, which was admitted into evidence, is identical to Exhibit 1 attached to the petition to review criminal proceedings.

This 15th day of February, 1968.

/s/ NORMAN B. SMITH
Attorney for Petitioner.

/s/ W. H. S. BURGWYN, JR.
Solicitor.

IN THE
COURT OF APPEALS OF NORTH CAROLINA

[Title Omitted in Printing]

ASSIGNMENTS OF ERROR

1. The Superior Court committed prejudicial and reversible error in making the following findings of fact in its Order:

> Petitioner defendant was arrested at approximately 9:30 to 11:00 o'clock P.M. on July 16, 1964, while burglarizing, or attempting to burglarize the home of Mr. and Mrs. Silas M. Rowland, in the City of Roanoke Rapids, Halifax County, North Carolina, it being the identical home that he had a few nights previously burglarized and raped the female occupant;
>
> * * * *
>
> that said petitioner defendant freely admitted to his attorney his guilt of the crime with which he was charged, in fact said petitioner defendant, Charles Lee Parker, upon cross examination at this hearing, and the Court so finds as a fact, has freely admitted his guilt of the capital offense of burglary and rape; however, said defendant has not at this date been indicted nor placed on trial for the capital offense of rape;
>
> * * * *
>
> that no particular statement has been made at these hearings denying the truthfulness of the petitioner defendant's plea and guilt of the offense charged. To the contrary the petitioner defendant in person and from the witness stand under oath has admitted on cross examination the truth of the charge.

These findings of fact are erroneous because they do not pertain to any issues or questions of fact properly before the Court in a post-conviction hearing, and because they are based entirely upon evidence which is incompetent in a post-conviction proceeding. To the foregoing assignment

of error, petitioner's EXCEPTIONS 53, 54 and 58 (R pp 28, 29, 30) are directed.

2. The Superior Court committed prejudicial and reversible error in making the following finding of fact:

> that the petitioner defendant has stated at this hearing that he was content with his plea and sentence and completely satisfied with the effort of his attorney, the Honorable Dwight Cranford until some few months after incarceration when he learned that other persons had been sentenced to five to six years for the same crime with which he was charged, which statement as to a sentence of five to six years for the identical crime charged against petitioner defendant, Charles Lee Parker, is erroneous in law and false in fact, although said petitioner defendant might have so considered the same true;

The Court erred in making the above finding of fact on the ground that it is not pertinent to any issue of fact or question of fact properly raised in a post-conviction proceeding, and this finding of fact is based entirely on evidence which is incompetent in a post-conviction proceeding. To this assignment of error, petitioner's EXCEPTION #57 (R p 30) is directed.

3. The Superior Court committed prejudicial and reversible error in making the following finding of fact:

> that the petitioner defendant was tried at said August Term, 1964, upon a bill of indictment returned by a properly and legally-constituted grand jury, nine of which were selected at the first term of Halifax County Superior Court at the beginning of the spring session of 1964, and nine at the beginning of the fall session of said court by a child under ten years of age from the regular jury panel summoned at each term; that there was one Negro present on the grand jury which returned said bill of indictment a true bill; that there has been no systematic or purposely exclusion of persons of any race in selection of those for jury service by the Board of Commissioners of Halifax County; that said Commissioners have ex-

> cluded from jury service persons white, Negro, Indian and others who in its opinion were infirm in body or mind, had been convicted of felonies, or otherwise incompetent under the applicable provisions of the law of North Carolina;

This finding of fact is erroneous because it is not supported by any competent evidence, and more particularly because the State, as a matter of law, failed to overcome the prima facie case of systematic exclusion of Negroes from service on grand juries because of race, which arose from petitioner's evidence. To this assignment of error, defendant's EXCEPTION #55 (R p 29) is directed.

4. The Superior Court committed prejudicial and reversible error in making the following finding of fact:

> that as the record unquestionably reflects, and the Court so finds as a fact, said petitioner defendant, Charles Lee Parker, freely, voluntarily, without threat, coercion or duress, entered a plea of guilty to the offense of first-degree burglary before His Honor Howard H. Hubbard at the August Term, 1964, of the Superior Court of Hallifax County and was thereupon sentenced as required by law to the North Carolina State Penitentiary for the term of his natural life.

The above finding of fact is upon a question of both fact and law, and as such is not supported by sufficient evidence. To the above assignment of error, petitioner's EXCEPTION #56 (R p 30) is directed.

5. The Superior Court committed prejudicial and reversible error by sustaining the State's objection to the following: Questions to the petitioner:

> MR. SMITH: In coming to this decision, did you consider whether or not the police would be able to introduce this statement you made in evidence against you?
> MR. BURGWYN: Objection.
> COURT: Sustained.

* * * *

MR. SMITH: Did you give any thought to whether or not the police would be permitted to give this statement in evidence at the trial?
MR. BURGWYN: Objection.
COURT: Sustained.

The petitioner's answers to the foregoing questions would have been the same as the following allegation made under oath, contained in paragraph 6 of petitioner's Petition:

> The petitioner formed his decision to plead guilty on the basis of advice by counsel. In arriving at this decision, the petitioner did not consider whether he had been validly indicted and whether he had a right to challenge his indictment. Also, he did not consider that he would be able to prevent the involuntary confession which he had made to the police, from being used against him at the trial, and the threatened use of the involuntary confession was a motivating factor in the petitioner's decision to plead guilty.

The exclusion of this evidence was erroneous, because it was relevant and material to one of the issues raised by the petitioner, that is, his plea of guilty was a product of a coerced confession. To the above assignment of error, petitioner's EXCEPTIONS 1 and 2 (R p 44) are directed.

6. The Trial Court committed prejudicial and reversible error in failing to rule upon several objections made by the petitioner's counsel to questions propounded to witnesses by the Solicitor. To the above assignment of error, the petitioner's EXCEPTIONS 3, 5, 7, 9, 11, 13, 16, 20, 22, 24, 25, 33, and 46 (R pp 45, 46, 50, 51, 52, 58 and 76) are directed.

7. The Superior Court committed prejudicial and reversible error by failing to sustain the petitioner's objections to the following questions propounded to witnesses by the Solicitor:

MR. BURGWYN: And went in the nighttime?
MR. SMITH: Objection.

WITNESS: That's right.

MR. BURGWYN: And you had intercourse with the woman against her will?

MR. SMITH: Objection.

WITNESS: I can't say against her will. She didn't say anything about it.

MR. BURGWYN: You didn't tell her who you were?

MR. SMITH: Objection.

WITNESS: She didn't ask me.

MR. BURGWYN: You didn't turn any light on in the room?

MR. SMITH: Objection.

WITNESS: Didn't need no light.

MR. BURGWYN: She had never invited you there?

MR. SMITH: Objection.

WITNESS: She didn't tell me not to come.

MR. BURGWYN: She didn't know you?

MR. SMITH: Objection.

* * * *

WITNESS: I didn't know her either.

MR. BURGWYN: You went into a woman's home in the middle of the night, who didn't know you, and you didn't know her, had intercourse with her and plead guilty to first-degree burglary?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: Yes, sir.

* * * *

MR. BURGWYN: I ask you if your son didn't tell you in the presence of Mr. Cranford that he had been to this house on this night in question, had intercourse with this woman he didn't know and went in against her will?

MR. SMITH: Objection.

WITNESS: He didn't say against her will. Mr. Cranford asked him if he had ever been there, and he said, "Yes." I said, "It is hard for me to believe

Charles went in there because he don't pay no girls any mind and it is hard to believe that."

* * * *

MR. BURGWYN: That was the same house he had broken in before?

MR. SMITH: Objection.

WITNESS: That was my understanding. I don't recall if that is what he told me.

* * * *

MR. BURGWYN: Was this defendant caught in the act of the crime he was charged with?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: No, sir.

MR. BURGWYN: Was he caught at the house that he had previously broken in or was charged with?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: The same house, yes, sir.

The Court erred in admitting the foregoing testimony into evidence, on the ground that it was irrelevant to the questions and issues raised in the proceeding, since it pertained only to the question of petitioner's guilt or innocence of the crime of which he was convicted, and had no relevance whatever to the constitutionality of the petitioner's trial and sentence. To the above assignment of error, the petitioner's EXCEPTIONS 4, 6, 8, 10, 12, 14, 29, 34, 47, 51 and 52 (R pp 45, 46, 52, 58, 76, 78, 79) are directed.

8. The Superior Court committed prejudicial and reversible error by failing to sustain petitioner's objections to the following questions propounded to witnesses by the Solicitor:

MR. BURGWYN: I ask you, after you were in prison some thirty to sixty days, if you didn't write Mr. Cranford a letter telling him how much you appreciated what he had done for you?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: I don't remember writing Mr. Cranford, either.

* * * *

MR. BURGWYN: I read it to you, and this was written from Central Prison about one week after you were sent to prison:

> Dear Mr. Cranford: I received a letter from my mother and she told me what you said. We plan on following all the rules that they make before me. But anyway I am glad the placed me in prison because I was going to quit school and I know I would have got in some trouble. It's not all bad here. I get a chance to finish school. I suppose to go to Polk Youth Center and I can take a trade. And I am very sorry I caused you all the trouble at the trial. Oh they say be in Raleigh a while I suppose to see a doctor. They think I am crazy. Well I want to thank you for all you did for me.
>
> Charles Lee Parker

You wrote that letter, didn't you?

MR. SMITH: Objection.

WITNESS: I don't recall.

MR. BURGWYN: At the time Mr. Cranford represented you and at the time you wrote this letter, I ask you this one question: were you not at that time completely satisfied with Mr. Cranford's representation of you in Court?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: Other than about thirty days after I got in the penitentiary, I thought he did the best he could.

* * * *

MR. BURGWYN: Did you ever talk to him?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: Yes, sir.

MR. BURGWYN: Where?
MR. SMITH: Objection.
WITNESS: In the penitentiary.
MR. BURGWYN: After he wrote you, or before?
MR. SMITH: Objection.
WITNESS: He came to see me and then wrote me.
MR. BURGWYN: Why did he come to see you?
MR. SMITH: Objection.
WITNESS: I guess to help me. People in Halifax County did me so wrong.
MR. BURGWYN: For what?
MR. SMITH: Objection.
WITNESS: Give me life sentence for what boys in other counties usually get five or six years for.
MR. SMITH: Motion by petitioner to strike.
COURT: Motion denied.

* * * *

MR. BURGWYN: After the case was over and your son was in prison, I ask you if you haven't talked to Sheriff Daniels on one or two occasions, and told him how happy you were that things turned out of this did?
MR. SMITH: Objection.
COURT: Overruled.
WITNESS: No, sir. Charles was sentenced on Tuesday like of this past week and the following Monday I was downtown. I had been to Mr. Cranford's office to pay him what little money I had. I came back and stopped at Star Furniture Company. I was standing there and Mr. Daniels passed me and didn't speak and went on and then came back and talked to me about fifteen minutes. He asked me how Charles was and thought he would get a good education. He said Charles was a good boy and just got with the wrong crowd. He said that he was glad he was getting on all right. I said I hoped he would be all right. He said he could go to to college. I did not say to the Chief of Police that I was dissatisfied with Mr. Cranford. Nobody has asked me whether I

was dissatisfied or pleased with anything that happened in the court. I did not feel that Charles got justice. Nobody asked me. I have not been to anybody and complain.

* * * *

MR. BURGWYN: Did you at a later date receive a letter from Charles Lee Parker in prison?

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: I did.

MR. BURGWYN: Read the letter.

MR. SMITH: Objection.

COURT: Overruled.

WITNESS: This is on prison stationery, and it is as follows:

"Dear Mr. Cranford:

I received a letter from my mother and she told me what you say. What I plan on following all the rules they place before me but in a way I am glad the place me in prison because I was going to quit school and I know I would have got in some trouble. It's not all bad here. I get a chance to finish school. I suppose to go to Polk Youth's Center and I can take a trade and I am very sorry I caused you all the trouble at the trial. Oh they say be in Raleigh a while. I suppose to see a nut doctor. They think I am crazy. Well I want to thank you for all you did for me.

(Signed) Charles Lee Parker"

This letter was dated about two weeks after he was tried. I never saw his father after the trial as I recall. I talked to his mother between the trial and when I got that letter. At that time I suppose I did most of the talking; I told her to encourage Charles to make the best of prison and to try to go to school and I thought he would be out before he was thirty.

MR. BURGWYN: Did she complain to you about your representation or handling of the case?

MR. SMITH: Objection.
COURT: Overruled.
WITNESS: She did not. She thanked me.
MR. BURGWYN: Did she finish paying you your fee?
MR. SMITH: Objection.
COURT: Overruled.
WITNESS: She paid me some more on it but never completed paying it.

* * * *

MR. BURGWYN: The State offers in evidence as State's Exhibit 1 the statement of Viola Parker, as State's Exhibit 2 the statement of Charles Lee Parker, and as State's Exhibit 3 a letter from Charles Lee Parker to Dwight L. Cranford.
COURT: Allowed.

* * * *

MR. BURGWYN: In your conversation with his mother after he plead guilty, did she complain about any treatment?
MR. SMITH: Objection.
COURT: Overruled.
WITNESS: No, sir.
MR. BURGWYN: Did she make any statement to you?
MR. SMITH: Objection.
COURT: Overruled.
WITNESS: Viola has talked to me three times to my knowledge that I would see her on the street about Charles Lee and each time she has told me how well he was getting along in prison and I believe at one time she told me he was going to school regular and was a member of the boxing team and got along real good and if it weren't for the fact that he would have to stay away so long it was the best thing that ever happened to me. I said, "There is a probability, if he behaves himself, he won't have to stay too long." She asked me if I ever went to the camp where he was, to stop and talk to him, and I told her I would.

The Court erred in admitting into evidence the foregoing testimony on the ground that it was irrelevant, since it pertained only to statements made by and thoughts of the petitioner and his mother during the several months subsequent to the petitioner's trial and sentence, and such matter had no bearing on the constitutionality of petitioner's trial and sentence. To the above assignment of error, petitioner's EXCEPTIONS 15, 17, 18, 19, 21, 23, 25, 27, 28, 32, 41, 42, 43, 44, 45, 49 and 50 (R pp 50, 51, 52, 57, 58, 72, 73 and 78) are directed.

9. The Trial Court committed prejudicial and reversible error by failing to sustain petitioner's objection to the following question asked by the Solicitor of a witness:

> MR. BURGWYN: Your father wasn't here at your trial. You were tried for your life and your father didn't have enough interest to come to Court?
> MR. SMITH: Objection.
> COURT: Overruled.
> WITNESS: My mother was here.

It was error to permit the above question to be asked, because it called for incompetent opinion evidence as to another person's state of mind, and because the presence or absence of the petitioner's father from his trial was irrelevant in this proceeding. To the above assignment of error, the petitioner's EXCEPTION #30 (R p 52) is directed.

10. The Superior Court committed prejudicial and reversible error by permitting the Solocitor to ask the following question over the petitioner's objection:

> MR. BURGWYN: Did you father ever attempt to visit his son?
> MR. SMITH: Objection.
> COURT: Overruled.
> WITNESS: My father was working.

This question plainly called for hearsay testimony, and should not have been allowed. To the above assignment of error, the petitioner's EXCEPTION #36 (R p 63) is directed.

11. The Superior Court committed prejudicial and reversible error by sustaining the State's objection to petitioner's examination of the witness Hubert M. Blalock, Jr., as follows:

> MR. SMITH: What are these degrees in?
> MR. BURGWYN: Objection.
> COURT: Mr. Smith, what is the purpose of calling this witness?
> MR. SMITH: The petitioner has called this witness for the purpose of having him qualify as an expert in statistics, and have him testify as to the statistical probabilities of arriving at a racial distribution of grand jurors in Halifax County on a random or other unbiased basis, which is identical to the actual racial distribution of grand jurors during the term of court at which the petitioner was indicted and for all of the grand juries impaneled during the period from January, 1960, to the time of the petitioner's indictment, and also this distribution for all jury lists drawn by the jury commissioners during this period.
> COURT: This kind of testimony is not competent. I will sustain the Solicitor's objection. Testimony of probabilities has no place in a courtroom. When you talk about probabilities, you are talking about gambling. This man is a gambler. He might as well go to Las Vegas and make his living there.

The exclusion of this testimony was erroneous, because it would have been very relevant to the issue in the proceeding of whether, at the time of the petitioner's indictment, members of his race had been systematically excluded from the grand juries of Halifax County. To the above assignment of error, petitioner's EXCEPTION #37 (R pp 67-68) is directed.

12. The Superior Court committed prejudicial and reversible error by refusing to allow the petitioner to have the testimony of the witness Hubert M. Blalock, Jr. made a part of the record for consideration by the Court on petitioner's Petition for a Writ of Certiorari:

MR. SMITH: The petitioner requests leave of the Court to place the testimony of the witness on record, so that it can be preserved for appeal.

COURT: I will deny that request. You may prepare an affidavit of his testimony, and if it is satisfactory to me, I will allow it to be placed in the record.

To the above assignment of error, the petitioner's EXCEPTION #38 (R pp 67-68) is directed.

(TRANSCRIPT CERTIFIED BY CLERK SUPERIOR COURT)

IN THE COURT OF APPEALS
OF NORTH CAROLINA

No. 68SC125

CHARLES LEE PARKER

v.

STATE OF NORTH CAROLINA

ON Writ of Certiorari to review an order of *Parker, Joseph W., J.*, at the 13 November 1967 Special Civil Session of Superior Court of HALIFAX County.

At the August 1964 Session of Halifax Superior Court petitioner, Charles Lee Parker, pleaded guilty to an indictment for first-degree burglary and was sentenced to life imprisonment. The present proceedings were commenced in 1967 by petition filed under the North Carolina Post-Conviction Hearing Act, G.S. 15-217, *et seq.* Petitioner challenges the constitutional validity of the judgment sentencing him to prison on two grounds: (1) that the indictment against him was invalid in that members of his race had been systematically excluded from

the grand jury which returned it against him and he had not waived this jurisdictional defect; and (2) that his plea of guilty was a product of his prior coerced confession. Hearings were held on this petition in the Superior Court of Halifax County on 13 November and 19 December 1967.

Evidence submitted by petitioner and by the State at the post-conviction hearings indicated the following facts: On Thursday night, 16 July 1964, about 11:00 p.m. the petitioner, Charles Lee Parker, a Negro boy then 15 years old, was arrested by the police officers as he walked into a yard and went up to a door of a house in Roanoke Rapids. On the preceding Sunday night at approximately 11:00 p.m. someone had broken into this same house and had raped a female occupant. Following his arrest petitioner was taken to the police station where he was questioned as to whether he had broken into any houses. He refused to tell his name or where he was from. The questioning continued for an hour or two, after which he was placed in an unlighted cell for the remainder of the night. There was a drinking fountain in the cell, but no water in it. Petitioner was not given anything to eat that night. The following morning he was again questioned for about an hour, at which time he signed a confession. During the night the officers in some manner learned his identity and about 4:30 a.m. the officers went to his home and informed his mother that he had been arrested. Early the following morning the mother employed the services of an attorney in Roanoke Rapids to represent her son. On the same morning the attorney went to the police station and there talked with petitioner who told him he had already confessed to the police. The attorney questioned him as to whether, when he made the confession, he had been threatened in any manner, whether any promises were made to him, and whether he was scared at the time he made the statement. He told his attorney that no threats and no promises had been made and that he was not scared. Petitioner was given drinking water the second time he was interrogated and was given two sandwiches after he had confessed. At the trial in Halifax Superior Court which occurred on 17 and 18 August 1964,

the mother was present and the attorney discussed with her and with the petitioner the nature and seriousness of the charge of first-degree burglary against petitioner, and both the mother and the petitioner signed written statements authorizing the entry of a plea of guilty to first-degree burglary. At the time these statements were signed petitioner and his mother realized that by entering such a plea he would be sentenced to life imprisonment. In petitioner's statement he also acknowledged that he had not been threatened or abused in any manner by any person and that no promises had been made to him if he pleaded guilty to any charge. Prior to imposing sentence, the judge presiding at the trial examined the petitioner and his mother and made a finding that the petitioner understood the import of his plea and that it was made freely and voluntarily. Sentence of life imprisonment was thereupon imposed. Petitioner's attorney at no time discussed with him the racial makeup of the grand juries in Halifax County or the possibility of quashing the bill of indictment.

From order denying any relief, petitioner made application for Writ of *Certiorari*, which was granted.

T. W. Bruton, Attorney General and James F. Bullock, Deputy Attorney General, for the State.

Norman B. Smith for the petitioner.

OPINION—Filed August 14, 1968

PARKER, J.

At his post-conviction hearing petitioner introduced evidence tending to show a statistical disparity between the racial composition of the adult population of Halifax County as compared with the racial composition of the grand juries of the county at the time of his indictment and for a substantial period prior thereto. He contends that this evidence made a *prima facie* case that members of his race had been systematically excluded from the grand jury which had indicted him, that the State had introduced no competent evidence to rebut such *prima*

facie case, and that the court's finding of fact to the effect that there had been no systematic exclusion of Negroes from such jury was not supported by competent evidence. In support of his contention petitioner cites: *Arnold* v. *North Carolina*, 376 U.S. 773, 84 S. Ct. 1032, 12 L. ed. 2d 77; *State* v. *Lowry*, 263 N.C. 536, 139 S.E. 2d 870; *State* v. *Wilson*, 262 N.C. 419, 137 S.E. 2d 109.

Under the criminal procedure of this State, however, objection to the grand jury is deemed waived unless raised in apt time by motion to quash the indictment. *State* v. *Rorie*, 258 N.C. 162, 128 S.E. 2d 229. Such a motion may be made as a matter of right up to the time defendant is arraigned and enters his plea. The presiding judge as a matter of grace has discretionary power to permit the accused to make the motion to quash the indictment after his plea is entered and until the petit jury is sworn and impaneled to try the case on the merits. Thereafter the presiding judge has no power at all to entertain a motion to quash the indictment. *Miller* v. *State*, 237 N.C. 29, 74 S.E. 2d 513. If the objection is raised in apt time, by making the motion to quash before entering a plea, a subsequent plea of guilty does not waive the objection. *State* v. *Covington*, 258 N.C. 501, 128 S.E. 2d 827.

In the present case petitioner did not raise the objection prior to entering his plea of guilty. He raised it for the first time in the post-conviction proceedings commenced approximately three years after entry of his plea of guilty and the judgment sentencing him to life imprisonment. Under the established criminal procedure of this State, petitioner's objection comes too late. G.S. 9-26.

It may be granted that petitioner, as many other defendants in criminal cases, was not familiar with the rules of criminal procedure. Nevertheless, such rules are necessary for an orderly administration of justice. It is precisely for the reason that defendants in criminal cases may not be familiar with all of their rights and the means of protecting them that we require they be represented by counsel. Petitioner here was represented by experienced and competent trial counsel employed by his family for that purpose.

> "It is inherent in the judicial process that courts must deal with litigants as though they were acting in the persons of their attorneys. For this reason, the law confers upon the attorney for the defense in a criminal case the power to take such steps in matters of practice and procedure as he deems appropriate to protect the interests of the accused, and decrees that the accused is bound by his action as to those matters. . . . It necessarily follows that the attorney for the defense in a criminal action may waive a constitutional right of his client relating to a matter of practice or procedure. . . . The right of a Negro defendant to object to a grant or petit jury upon the ground of discrimination against members of his race in the selection of such jury is waived by failing to pursue the proper remedy." *Miller* v. *State*, *supra*.

In conformity with the decisions of the Supreme Court of North Carolina, we hold that petitioner, acting through his employed attorney, waived any objection to the grand jury by his failure to move in apt time to quash the indictment. Petitioner cites, *contra*, *McNeill* v. *North Caroline*, 368 F. 2d 313, a decision of the United States Fourth Circuit Court of Appeals.

In his order denying petition relief the superior court judge found as a fact that petitioner had "freely, voluntarily, without threat, coercion or duress entered a plea of guilty to the offense of first-degree burglary" at the August, 1964 Term of Halifax Superior Court. Petitioner excepts to this finding as not being supported by sufficient evidence. In his brief petitioner's counsel argues that "logic compels that the petitioner's guilty plea be considered a product of his involuntary confession, and that therefore it must be determined that the petitioner's guilty plea was coerced and the Court was without jurisdiction to sentence the petitioner." This argument is valid only if the evidence at the post-conviction hearing would as a matter of law compel the finding of two things: first, that absent the confession the guilty plea would not have been entered; and second, that the confession was in fact involuntary. In our opinion, the evidence does not as a matter of law compel such a finding as to either. As to

the first, there may well have been strong evidence to establish defendant's guilt available to the State had the plea of guilty not been entered, and it may have been that petitioner and his trial counsel were aware of such evidence. The record clearly discloses that petitioner, in the presence of his mother freely acknowledged his guilt to his trial attorney. We cannot say as a matter of law that "logic compels" that petitioner's guilty plea was the product of his prior confession to the police. Nor does a careful examination of the entire record, with particular attention being given to petitioner's own testimony, compel the conclusion as a matter of law that petitioner's confession to the police was coerced or otherwise obtained in an unconstitutional manner. There was no prolonged or continuous interrogation by the officers. By his own testimony he was questioned only "an hour or two" on the night of his arrest, at which time he refused to disclose even his name. He was questioned "about an hour" the next morning, when he confessed. He does not contend he was in any way physically abused. He told his attorney, who visited him a few minutes after his confession, that no threats and no promises had been made and that he was not scared.

At the post-conviction hearing petitioner testified that on the night of his arrest he had asked to see his attorney and his mother, but he admits that at that time he refused to tell the officers what his name was, or the name of his mother, or who his lawyer was. At the post-conviction hearing he also testified that on the night of his arrest he was not given anything to eat or drink, but even if true this hardly seems coercive in view of the fact he admitted having had supper that night. At his post-conviction hearing he also testified that prior to his confession the officers had promised to help him as best they could but didn't say what they would do. All of this testimony, that he had asked and been denied the right to see his lawyer, that he had been denied food and water, and that the officers had made promises to him, was first given by petitioner at his post-conviction hearing more than three years after his arrest. And it is inconsistent with what he himself told his lawyer on the morning following

his arrest. The evidence in the record simply does not, at a matter of law, compel a finding that petitioner's confession was involuntary or that in obtaining it the police violated any of his constitutional rights.

Petitioner also contends that his plea of guilty was involuntary because of his fear of receiving a death sentence if he had risked a jury trial by a plea of not guilty. He argues that this was an inherently coercive factor which necessarily deprived him of freedom of choice in making his plea, thereby imposing an impermissible burden upon his exercise of his Fifth and Sixth Amendment rights under the Federal Constitution. *United States* v. *Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. ed. 2d 138. The North Carolina Supreme Court, however, has had occasion recently to point out the material differences in the Federal Kidnapping Act with which the United States Supreme Court was concerned in *Jackson*, and the North Carolina Statutes relating to the death penalty and to the permissive tender of a plea of guilty. In *State* v. *Peele*, 274 N.C. 106, filed 14 June 1968, the North Carolina Supreme Court pointed out that:

> "G.S. 15-162.1 is for the benefit of a defendant and may be invoked only on his and his counsel's written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the *Jackson* case, there are 'defendants who would greatly prefer not to contest their guilt.' Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty."

In view of the rigid court supervision which G.S. 15-162.1 requires before a guilty plea may be entered, we hold that the interplay of that statute with statutes such as G.S. 14-52 which impose the death penalty in cases where the defendant is convicted after a plea of not guilty and the jury fails to recommend life imprisonment, does not result in any substantial denial of a defendant's constitutional rights.

Petitioner also assigns as error the court's admission of evidence relative to petitioner's guilt of the crime for which he had been convicted. At the post-conviction hearing the petitioner, on cross-examination by the solicitor and over objection by his counsel, freely admitted that he had entered the house which he was charged with having burglarized and there having intercourse with a female occupant who had not been previously known to him. The purpose of the proceeding under the North Carolina Post-Conviction Hearing Act, G.S. 15-217, *et seq.*, is not to determine petitioner's guilt or innocence. That matter has already been determined in the trial and judgment which is the subject of post-conviction review. The purpose of post-conviction review is to determine whether in the proceedings leading to the conviction there occurred any substantial denial of petitioner's constitutional rights. G.S. 15-217. Therefore, testimony as to petitioner's guilt was not relevant in the post-conviction proceedings. However, its admission in no way prejudiced petitioner's opportunity to develop fully the testimony which was relevant to the constitutional issues raised by him and its admission was at most harmless error.

Petitioner has made other assignments of error relating to admission or exclusion of evidence and to the court's failure to rule on objections to evidence. We have examined these carefully but find no prejudicial error.

The judgment is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

SUPREME COURT OF THE UNITED STATES

No. 995 Misc., October Term, 1968

CHARLES LEE PARKER, PETITIONER

v.

NORTH CAROLINA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 23, 1969

On petition for writ of Certiorari to the Court of Appeals of the State of North Carolina.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket No. 1556, placed on the summary calendar and set for oral argument immediately following No. 1064.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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FILED
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No. [redacted]

STATE OF NORTH CAROLINA,

Appellant.

—v.—

HENRY C. ALFORD,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 268

CHARLES LEE PARKER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF ALBERT BOBBY CHILDS, MARIE HILL AND ROBERT LEWIS ROSEBORO

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OCTOBER TERM, 1969

No. 50

STATE OF NORTH CAROLINA,

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—v.—

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF ALBERT BOBBY CHILDS, MARIE HILL AND ROBERT LEWIS ROSEBORO

Movants, Albert Bobby Childs, Marie Hill and Robert Lewis Roseboro respectfully move the Court for permission to file a Brief *Amici Curiae*. The reasons assigned for the filing of the Brief *Amici Curiae* are contained in the Statement of Interest of the *Amici* in the Brief *Amici Curiae*.

The appellee in State of *North Carolina* v. *Alford* and petitioner in *Parker* v. *State of North Carolina* have consented to the filing of a brief *amici curiae*. The present motion is necessitated because attorneys for the State of North Carolina, appellant in *North Carolina* v. *Alford* and respondent in *Parker* v. *North Carolina*, have indicated that they would consent to the filing of the Brief *Amici Curiae* only for *amicus* Albert Bobby Childs, as the cases of *amici* Marie Hill and Robert Lewis Roseboro are still pending on appeal in the Supreme Court of North Carolina.

WHEREFORE, movants pray that the Brief Amici Curiae be permitted to be filed with the Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 268

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vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 268

CHARLES LEE PARKER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

PETITIONER'S BRIEF

Opinion Below

The opinion of the Court of Appeals of North Carolina is reported at 2 N.C.App. 27, 162 S.E.2d 526.

Jurisdiction

The judgment of the Court of Appeals of North Carolina was made and entered on August 14, 1968, and a copy thereof is set out in the Appendix. The jurisdiction of this

Court is invoked under 28 U.S.C. 1257(3). By virtue of the provisions of North Carolina General Statutes Sec. 7A-28, the judgment of the Court of Appeals of North Carolina is final, and not subject to further review by the Supreme Court of North Carolina.

Questions Presented

1. Whether it is a denial of the prisoner's rights under the Fourteenth and Fifth Amendments to the Constitution of the United States, in a state proceeding, for the prisoner to be precluded from proving the lack of jurisdiction of the court in which he was tried and convicted because of racial discrimination in the selection of the grand jury which indicted him, on the ground of his failure to make a motion to quash the indictment, when it is uncontradicted that the prisoner did not know of his right to indictment by a grand jury free of racial discrimination, and did not voluntarily relinquish this right.

2. Whether it is a denial of the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States in a state proceeding, for the defendant to be convicted and sentenced to life imprisonment for the capital offense of burglary, upon a guilty plea, under a statutory procedure whereby a plea of not guilty involves the threat of capital punishment, but a plea of guilty immunizes the defendant from capital punishment, in the absence of proof beyond a reasonable doubt that this statutory arrangement did not influence the defendant to plead guilty.

3. Whether it is a denial of the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Con-

stitution of the United States in a state proceeding, for a plea of guilty to be allowed to support a conviction and life sentence for the crime of burglary, where a prior involuntary confession was obtained from the defendant, the defendant believed this confession would be used against him if he pleaded not guilty, and the State has not established beyond a reasonable doubt a lack of connection between the coerced confession and the guilty plea.

Constitutional and Statutory Provisions Involved

Constitution of the United States:

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of North Carolina:

ARTICLE I, SECTION 13:

Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal.

General Statutes of North Carolina:

N.C.G.S. §14-52 (1953)

Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall

so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the Court.

N.C.G.S. §15-162.1 (1965)

Plea of guilty of first degree murder, first degree burglary, arson or rape.—(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.

(b). In the event such a plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

(c). Unless and until the State accepts such plea, no reference shall be made in open court at the time

of arraignment or at any other time to the tender or proposed tender of such plea; and the fact of such tender shall not be admissible as evidence either for or against the defendant in the trial or at any other time and place. The defendant shall have the right to withdraw such plea, without prejudice of any kind, until such time as it is accepted by the State.

Statement of the Case

The petitioner, Charles Lee Parker, was sentenced to life imprisonment for first degree burglary, upon a guilty plea, by the Superior Court of Halifax County, North Carolina, on August 18, 1964. (App. 40) He commenced proceedings under the North Carolina Post Conviction Hearing Act, N.C.G.S. Sec. 15-217, et seq. (1965), in the Superior Court of Halifax County. The questions raised in this proceeding were before the court in the post conviction proceeding. (App. 2-7) Judgment denying the petitioner's prayer for a new trial was entered on December 19, 1967. (App. 27-30) A writ of certiorari to review this judgment was granted by the Court of Appeals of North Carolina (App. 38) and on August 14, 1968, the Court of Appeals affirmed the judgment denying petitioner a new trial.

The petitioner, a Negro, was convicted of the crime of burglary and sentenced to life imprisonment when he was 15 years old. On July 16, 1964, he was arrested at gunpoint and taken to the Roanoke Rapids, North Carolina, police station where he was questioned by white members of the police force. At first, the petitioner refused to answer any questions. At the outset he asked to see his

mother and a lawyer. The police said that he could not see anyone until he made a confession. The petitioner was questioned for an hour or two, and at about 11:00 p.m. he was placed in a single unlighted cell. In petitioner's cell there was a drinking fountain, but no water would come from it. (App. 40-41)

At about 3:40 a.m. on the day following petitioner's arrest, two policemen went to his house and told his mother, Mrs. Viola Parker that they had picked up the petitioner for being a "peeping tom." They told her there was no use for her to go to the station, since she would not be able to see her son. (App. 51)

The petitioner was questioned again by the police on the day following the arrest. Again he asked to see a lawyer. After about an hour of interrogation, petitioner confessed to breaking in a house; later he signed a written confession. After the confession was obtained, the petitioner was given food for the first time since he had been arrested. (App. 43)

The petitioner was transferred to the Halifax County Jail, where he remained until his trial on August 18, 1964. (App. 41) The petitioner's mother was with a newborn child and was unable to visit him while he was at the county jail. (App. 52) Petitioner's sister, Doris Jean Usserey, attempted to visit him on three different occasions. Petitioner's sister called the jail in advance to find out when visiting hours were, and each time she attempted to visit the petitioner, she arrived at a time which she had been advised was within the visiting hour period. On each occasion, the officers at the jail refused to let her see the petitioner. (App. 58-59)

Petitioner's mother retained Dwight Cranford, an attorney of Roanoke Rapids, North Carolina, to represent petitioner. As a witness for the State in the post conviction hearing, Mr. Cranford testified that the petitioner told him he had not been threatened, no promises had been made to him, and he was not scared at the time he confessed. (App. 66-67) He said he and petitioner were together most of the day preceding the trial and the day of the trial. The petitioner and his mother signed affidavits to the effect that they understood the seriousness of the charge and sentence, and that no threats, abuse, or promises had been made, and that they agreed to the entry of a plea of guilty. (App. 67-68) Mr. Cranford told petitioner that if he were to plead not guilty, he would receive the death sentence unless the jury recommended mercy, but that by pleading guilty he would receive a life sentence. The attorney advised petitioner to plead guilty. Mr. Cranford testified he did not remember any discussion with the petitioner as to whether the confession could be kept out of evidence. He said he knew that if the confession was not kept out, the petitioner was "sunk." (App. 71) Petitioner thought that since he had confessed to the police, there was little his attorney could do. (App. 42) The threatened use of the involuntary confession influenced petitioner to plead guilty. (App. 5)

Petitioner was questioned by the court before his plea was accepted. (App. 46) He gave negative answers to routine questions about whether promises had been made or force applied to secure his guilty plea, and whether the plea was made with fear or compulsion. (App. 46)

At the post conviction proceeding, petitioner was allowed to introduce into evidence a medical résumé done

at the prison, which concluded that petitioner is an uninhibited and impulsive individual, and that he would likely become involved in any direct behavior pattern that presented itself as a means of securing his immediate goals. (App. 65, 77-78)

Police officers present at the post conviction hearing, who had knowledge of petitioner's arrest, interrogation, and detention, were not examined by the State on these subjects; and hence petitioner's testimony summarized here was uncontradicted. (App. 40-41, 73-75)

The grand jury that indicted petitioner had 18 members, only one of whom was a Negro. (App. 14, 17, 62) There were eight Negroes among the 98 persons who served on all the grand juries which sat in Halifax County, for the four years preceding the petitioner's trial. (App. 62) During the same period, 2,820 white persons and 134 colored persons were on all of the venires drawn for grand and petit jury service. (App. 61) From the testimony of the clerk to the jury commission of Halifax County, it appeared that the commissioners compiled the jury list from the county tax records, by taking the names of persons whom they knew to be of good moral character, never convicted of a crime, and of sufficient intelligence to serve on a jury. (App. 55-56) This officer testified that all the commissioners were white people, that they naturally knew more white people than Negroes. He said in his opinion many Negroes were omitted from the list because the commissioners did not know anything about them and did not know whether they were fit to serve or not. (App. 63) He said, however, that no names were rejected because of race. (App. 63) Separate tax records are maintained for white and colored taxpayers in Halifax County. One copy

of the jury list was cut into strips and put in the jury box from which jurors are drawn. (App. 55) Grand jurors serve for one year; every six months nine new members of the grand jury are drawn to replace those whose terms have expired. (App. 57-58)

At the post conviction proceeding, it was stipulated by counsel that approximately 11,000 white persons and 7,000 colored persons were listed in the 1960 and 1964 levies in Halifax County. (App. 58) It was also stipulated that, according to the 1960 census of Halifax County, of the persons 21 years of age and older, 54.5% were white and 45.5% were non-white; also, of the total population, 45.3% were white and 54.7% were Negro. (App. 64, 76)

The testimony of Hubert M. Blalock, Jr., a professor of statistics in the Sociology Department of the University of North Carolina, was excluded by the court. The court stated that testimony about probabilities was concerned with gambling, that the witness was a gambler, and that he might as well go to Las Vegas to make his living. (App 64-65) According to his affidavit, which is a part of the record, Mr. Blalock would have testified that the probability of getting one (or no) Negro juror out of a total of 18 grand jurors in a county with a Negro population comparable to that of Halifax County, where a racially non-discriminatory selection process is used, is 13 in 10,000 or approximately one in 1,000. (App. 19-20)

The petitioner did not make a motion to quash his indictment before trial and did not raise the question of racial discrimination in the selection of the grand jury prior to the post conviction proceeding. The petitioner testified that he did not know anything about racial com-

position of the Halifax County grand jury at the time he was tried and sentenced. (App. 42) Dwight Cranford, the petitioner's attorney, did not discuss with him the racial makeup of grand juries in the county, nor the possibility of quashing the bill of indictment. (App. 72)

With respect to the issues raised in this proceeding, the Court of Appeals of North Carolina held (1) the statutory system whereby the plea of not guilty to a capital offense entails the risk of the death penalty, while the plea of guilty eliminates that risk, does not deny a criminal defendant's constitutional rights; (2) the petitioner's confession was not involuntary, and the petitioner's guilty plea was not a product of the confession; and (3) failure to make a motion to quash the indictment in apt time waives a criminal defendant's right to have the indictment, conviction, and sentence set aside on the ground of systematic exclusion of members of his race from grand jury service.

Summary of the Argument

I.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Abridged in Dismissing His Challenge to Indictment by a Grand Jury, From Which the Members of His Race Had Been Excluded Systematically.

A. It Is Established That There Was Systematic Exclusion of Negroes From the Grand Jury That Indicted Petitioner.

There was but a single Negro on the 18-man grand jury that returned the indictment, and only eight Negroes were among the 98 persons who had served on all the grand juries in the county where petitioner was tried, for the four years preceding his trial. Negroes comprised 45% of the adult population of the county, and 39% of the taxpayers of the county. The jury commissioners were all white persons. The jury lists were taken from segregated tax books.

The State did not offer any evidence, other than unsupported opinions, to rebut petitioner's prima facie case of racial discrimination in grand jury selection.

B. Failure of Petitioner's Lawyer to Make a Motion to Quash the Indictment, in the Absence of Participation by Petitioner in That Decision, Does Not Constitute a Waiver of the Right to Obtain Relief for Exclusion of Negroes From the Grand Jury.

Petitioner did not know anything about the racial composition of grand juries in the county where he was tried,

and he did not have any discussions of this subject with his lawyer. Petitioner and his lawyer did not discuss the possibility of quashing the bill of indictment. The court below held that failure to make the motion to quash barred relief.

Because petitioner neither had independent knowledge nor was informed by his counsel, of a right to attack the racial discrimination in the composition of his grand jury, there is no basis for a finding that he effectively waived this right by failing to make a motion to quash the indictment.

II.

The Petitioner's Guilty Plea Must Be Set Aside as Having Been Obtained in Violation of the Fifth, Sixth, and Fourteenth Amendments, Because the Guilty Plea Removed the Threat of Capital Punishment, While That Threat Would Have Remained if Petitioner Had Pled Not Guilty.

A. The State Has Not Shown That the Inherently Coercive Feature of the Statutes Relevant to This Case Did Not Render Petitioner's Guilty Plea Involuntary.

The North Carolina statutes under which petitioner was convicted and sentenced, are identical in all material respects to the statutes condemned in *United States* v. *Jackson*, on the ground that they place an impermissible burden upon the Fifth Amendment right of an accused not to plead guilty and the Sixth Amendment right of an accused to a jury trial. The guilty plea should be set aside in this case, on the authority of *United States* v. *Jackson*, because

in addition to the inherently coercive nature of the statutes, the factors of petitioner's youth, his limited experience, his mental aberration, and the advice and encouragement to plead guilty given by his counsel, establish that petitioner's guilty plea was involuntary. The State has failed to discharge the burden of proof incumbent upon the State by virtue of the illegality of the statutory arrangement, that these statutes did not cause petitioner's plea to be involuntary.

B. United States v. Jackson Should Be Applied Retroactively to This Case.

Because the guilty plea is the only sure means to escape capital punishment, there is a great probability that defendants, who are not in fact guilty, would offer guilty pleas to preserve their lives. The entry of a guilty plea acts as a surrender of all of the criminal due process rights, which collectively operate to insure the validity of the fact-finding process.

At the same time, statutes which possess the defects condemned in *United States* v. *Jackson,* exist in only nine states and the federal jurisdiction, and prisoners serving life sentences pursuant to these statutes, who would be potential beneficiaries of retroactive application of this case, are not sufficiently numerous to have a gravely disruptive effect on the administration of justice. For these reasons, *United States* v. *Jackson* should be applied retroactively to the present case.

III.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Violated by Allowing His Guilty Plea to Stand, When It Followed a Coerced Confession, and There Was No Showing That the Plea Was Not Influenced by the Confession.

The confession obtained from petitioner was coerced, because he was questioned for a substantial period of time at night without the presence of friendly adults, and was kept in an isolation cell overnight before the confession was obtained. The confession was also involuntary, by reason of continuation of the interrogation by the police after petitioner had requested to see his attorney and this request had been denied.

Petitioner testified that the confession had influenced him to plead guilty, and it is clear that petitioner's trial counsel was afraid the State would be able to use the confession against his client.

The State offered no evidence to show that the confession had been without effect on the guilty plea. Without proof by the State that there was no relationship between the confession and the guilty plea, the guilty plea should not be allowed to stand.

ARGUMENT

I.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Abridged in Dismissing His Challenge to Indictment by a Grand Jury From Which the Members of His Own Race Had Been Excluded Systematically.

A. It Is Established That There Was Systematic Exclusion of Negroes From the Grand Jury That Indicted Petitioner.

The petitioner, a Negro, was indicted by a grand jury from which the members of his race had been excluded systematically. There was a single Negro on the 18-man grand jury that returned the indictment. Only eight Negroes were among the 98 persons who had served on all the grand juries of Halifax County, North Carolina, for the four years preceding petitioner's trial, and during the same period there were 2,820 white persons and 134 colored persons on all the venires drawn for grand and petit jury service. Yet Negroes comprised 54.7% of the population and about 45% of the population over the age of 21 of Halifax County during the four year period, and about 39% of the persons enumerated on the tax lists of the county were Negroes.[1]

Separate tax records were maintained for white and colored taxpayers in Halifax County at the time of peti-

[1] Juries were virtually all male, as well as being nearly all white, because no toilet facilities were available for women in the old courthouse. (App. 57) No identifiably female names appear in the lists of grand jurors who served during the four years to and including the time of petitioner's indictment. (App. 15-17) This circumstance is not without significance in a case where burglary and rape are alleged. Cf., *White* v. *Crook*, 251 F. Supp. 401 (D.C. Ala. 1966).

tioner's indictment. The jury list was compiled from the county tax records by the jury commissioners, who selected the names of persons whom they knew to be of good character, never convicted of a crime, and of sufficient intelligence to serve on a jury. All of the commissioners were white people, and as the clerk to the jury commission testified, the jury commissioners knew more white people than Negroes. The clerk said that in his opinion many Negroes were omitted from the jury list because the commissioners did not know anything about them and did not know whether they were fit to serve or not. The clerk asserted that no names were rejected because of race, but the State offered no concrete evidence tending to disprove racial discrimination in selection of juries.

In Halifax County grand jurors serve for one year. Every six months nine members of the 18-member grand jury retire, and nine new members are drawn from the names contained in the jury box to replace them. The jury box contains one copy of the jury list, which has been cut into strips each consisting of a single name.[2]

The testimony of statistics professor Hubert M. Blalock, Jr., was excluded by the court, the judge stating that testimony about probabilities was concerned with gambling and that the witness might as well go to Las Vegas to make his living. Mr. Blalock's evidence of statistical probabilities regarding jury selection is part of the record in this case, however. Also the Court may take judicial notice of

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[2] This procedure was outlined in N.C.G.S. sec. 9-1, -2, -3, -24, -26 (1953). By N. C. Session Laws 1967, c. 218, s. 1, these statutes were repealed, and a new N.C.G.S. sec. 9-2 (1967) requires that the jury commission use tax lists, voter registration lists, and any other source deemed reliable to compile the jury list; the highly subjective standards of "good moral character" and "sufficient intelligence" have been eliminated.

statistical probabilities relating to the figures set out above. *Whitus* v. *Georgia,* 385 U. S. 545, 552 n. 2 (1967), citing Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966). The probability of getting one (or no) Negro juror on the grand jury which indicted petitioner, by using a non-discriminatory selection process in Halifax County, is 13 in 10,000 or about one in 1,000. The probability of having only eight Negroes among the 98 grand jurors who served over the four year period to and including the time of petitioner's indictment, by use of a non-discriminatory selection process, amounts to less than one in ten million.

Petitioner's evidence summarized above was amply sufficient to make out a prima facie case of systematic exclusion of Negroes from the grand jury, since the relevant criteria established a more extreme instance of grand jury discrimination than has been condemned by recent decisions of this Court. *Whitus* v. *Georgia, supra; Jones* v. *Georgia,* 389 U.S. 24 (1967); *Sims* v. *Georgia,* 389 U.S. 404 (1967).[3]

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[3]

	Whitus v. *Georgia*	*Jones* v. *Georgia*	*Present Case*
Population over 21	42.6% Negro men	30.7% Negro	45% Negro
Jury Commissioners	White (apparently)	White	White
Source of Juror Names	Tax digests separated and identified as to race	Three tax digests, two of which separated and identified as to race	Tax digests separated identified to race
Taxpayers	27.1% Negro	19.7% Negro	39% Negro
Negro Jurors	9.1% grand jury venire	5.0% of jury list and box	7.5% of grand juries over four years 5.5% of grand jury in this case
Rebuttal Evidence by State	None	None	None

The use of a segregated source, such as tax books separated by race, in itself causes the selection system to be suspect. *Whitus* v. *Georgia, supra; Williams* v. *Georgia,* 349 U.S. 375 (1955). The unsupported and unexplained opinion of the clerk to the jury commission that Negroes had not been excluded purposely from grand jury service, was the only rebuttal evidence offered by the State. This alone is unavailing to overcome petitioner's prima facie case. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Whitus* v. *Georgia, supra.*

B. Failure of Petitioner's Lawyer to Make a Motion to Quash the Indictment, in the Absence of Participation by Petitioner in That Decision, Does Not Constitute a Waiver of the Right to Obtain Relief for Exclusion of Negroes From the Grand Jury.

The Court of Appeals of North Carolina held that the petitioner had waived his right to be indicted by a grand jury free of racial discrimination, by failing to make a timely motion to quash the indictment. The petitioner, a 15 year old child, knew nothing about the racial composition of grand juries in Halifax County. The petitioner and his attorney did not discuss the racial makeup of grand juries in the county, nor the possibility of quashing the bill of indictment.

Statutory and case law in North Carolina which deem a motion to quash an essential prerequisite to attacking systematic exclusion of Negroes from the grand jury,[4] are

[4] *State* v. *Rorie,* 258 N.C. 162, 128 S.E.2d 229 (1962); N.C.G.S. sec. 9-26 (1953).

inexplicably inconsistent with North Carolina authority holding that the entry of a guilty plea does not amount to a waiver in this regard. *State* v. *Covington,* 258 N.C. 495, 128 S.E.2d 822, 258 N.C. 501, 128 S.E.2d 827 (1963). Hence, under the North Carolina practice, petitioner's entry of a guilty plea in this case is not regarded as waiving the right to attack the composition of the grand jury.

Petitioner's unwitting failure to instruct his lawyer to interpose a technical motion, according to the Court of Appeals of North Carolina, now is binding upon the petitioner for the duration of his life sentence in prison.

Indictment by a grand jury from whose ranks the members of defendant's race have not been systematically excluded is a fundamental right, violation of which operates to void the indictment and the ensuing conviction and sentence as well. *Cassell* v. *Texas,* 339 U.S. 282 (1950).

This Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege," and has declared that every reasonable presumption will be indulged against the waiver of fundamental constitutional rights. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). Also this Court has pointed out that mere silence of the record raises no presumption of waiver, and that waiver cannot be found in the absence of some affirmative conduct on the part of a defendant evidencing a deliberate and conscious rejection of a constitutional guaranty. *Carnley* v. *Cochran,* 369 U.S. 506 (1962).

This Court has made it clear that for a criminal defendant to waive a fundamental constitutional right, he cannot be bound by the acts of his lawyers; there must be evi-

dence that the defendant personally participated in the decision. *Fay* v. *Noia,* 372 U.S. 391 (1963). This standard was applied in *Brookhart* v. *Janis,* 384 U.S. 1 (1966), where it was held that a state criminal defendant could not be bound by his counsel's agreement to a prima facie trial, in which the state would need only to make a prima facie showing of guilt, and the defendant would neither offer evidence nor cross examine witnesses. In the present case, as in *Brookhart* v. *Janis,* 384 U.S. at 8, petitioner "neither personally waived his right nor acquiesced in his lawyer's attempted waiver," and hence the right to indictment by a legally constituted grand jury was not waived effectively.

The United States Court of Appeals for the Fourth Circuit has made the constitutionally requisite application of these doctrines to a fact situation identical with that of the present case. *McNeil* v. *North Carolina,* 368 F.2d 313 (4th Cir. 1966), holds that failure of a state criminal defendant to make a motion to quash the indictment on the ground of systematic exclusion of Negroes from the grand jury, does not support a finding that this defect was waived, in the absence of evidence showing an intelligent consultation between the defendant and his attorney on this subject. Accord, *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964). It is anomalous that the resolution of the rights of North Carolina petitioners, who have been indicted by improperly selected grand juries, should depend on whether the proceedings are in the State courts under the rule of the Court of Appeals of North Carolina in the present case, or in the federal courts under the rule of *McNeil* v. *North Carolina, supra.*

II.

The Petitioner's Guilty Plea Must Be Set Aside as Having Been Obtained in Violation of the Fifth, Sixth, and Fourteenth Amendments, Because the Guilty Plea Removed the Threat of Capital Punishment, While That Threat Would Have Remained if Petitioner Had Pled Not Guilty.

A. The State Has Not Shown That the Inherently Coercive Feature of the Statutes Relevant to This Case Did Not Render Petitioner's Guilty Plea Involuntary.

The present case is controlled by *United States* v. *Jackson,* 390 U.S. 570 (1968). There the Court struck down the death penalty provisions of the Federal Kidnapping Act, 18 U.S.C. sec. 1201(a) (1964), on the ground that it placed an impermissible burden upon the Fifth Amendment right of an accused not to plead guilty and the Sixth Amendment right of an accused to a jury trial.[5] The rights of a defendant in a state criminal proceeding not to plead guilty, *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956), and to be tried by an impartial jury, *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), are secured by the Due Process Clause of the Fourteenth Amendment.

United States v. *Jackson* holds that it is unconstitutional to have the death penalty available as an optional punishment incidental to jury trial upon a not guilty plea, while

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[5] *Pope* v. *United States,* 392 U.S. 651 (1968), following *United States* v. *Jackson,* set aside a death sentence imposed on a conviction and jury direction of punishment by death, in a prosecution under the Federal Bank Robbery Act, 18 U.S.C. sec. 2113(e) (1964).

the defendant is given the alternative of pleading guilty or waiving jury trial with an immunity from the death penalty. The Court established the invalidity of imposing the death penalty within this structure.

The defect that the Court found in the Federal Kidnapping Act was its inducement to plead guilty and forego trial by jury. "(T)he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." *United States* v. *Jackson, supra,* 390 U.S. at 583.

The statutory arrangement holds out a promise to the accused who stands before the bar of justice—the promise of life itself, that his life will be spared. A guilty plea, if induced by a promise which deprives it of the character of a voluntary act, is void. *Machibroda* v. *United States,* 368 U.S. 487 (1962).

In the present case, petitioner pled guilty to the crime of first degree burglary, and the court entered a life sentence, the only penalty the statute provides for guilty pleas to capital offenses. Had petitioner exercised his right to trial by jury upon a plea of not guilty, he would have risked the imposition of the death sentence by the jury. Petitioner was a victim of the constitutional defect of the statutory structure. It was because of the possible prejudice to a person in petitioner's position, that the Court arrived at its decision in *United States* v. *Jackson,* and hence it is necessarily contemplated by that decision that relief be granted in a case like the present one.

Petitioner was sentenced pursuant to N.C.G.S. sec. 14-52 (1953), which provides that first degree burglary is to be

punished by death, except that, "if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, . . ."[6] The only way for a defendant charged with first degree burglary to avoid the risk of capital punishment was to submit a guilty plea in writing, which must be accepted by the State with the approval of the court, which resulted in an automatic sentence of life imprisonment. N.C.G.S. sec. 15-162.1 (1965).[7]

In North Carolina a defendant may not waive trial by jury. N.C. Const., Art. I, sec. 13; *State* v. *Muse,* 219 N.C. 226, 13 S.E.2d 229 (1941). Under the federal procedure condemned in *United States* v. *Jackson,* the defendant had two options to avoid the death penalty, first, the guilty plea, and second, the plea of not guilty with trial by a judge. In North Carolina this second option is not available. Its absence aggravates the unfairness of the North Carolina procedure, because the avoidance of capital punishment entails waiver of the remaining Fourteenth Amendment rights associated with trial—confrontation and cross-examination of opposing witnesses, *Pointer* v. *Texas,* 380 U.S. 400 (1965); compulsory process for obtaining witnesses for the defendant, *Washington* v. *Texas,* 388 U.S. 14 (1967);

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[6] The other capital felonies in North Carolina are first degree murder, arson, and rape. The statutes providing for penalties for these crimes are similar to the statute quoted in the text. N.C.G.S. sec. 14-17, -21, -58 (1953).

[7] This provision was repealed by N. C. Session Laws 1969, c. 117. Presently there is no way to eliminate the risk of the death penalty in a North Carolina capital felony prosecution. By judicial construction, South Carolina has chosen an identical remedy for the defect identified in *United States* v. *Jackson. State* v. *Harper,* —— S.C. ——, 162 S.E. 2d 712 (1968).

privilege against compulsory self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1 (1964).[8] The absence of the right to waive trial by jury and have a trial by judge instead, renders the North Carolina statutory system "more conspicuously invalid than the federal statute in *Jackson*, because under the federal statute an accused could assert his innocence and avoid a death sentence by a bench trial, while in . . . (North Carolina) avoidance of a death sentence may be accomplished only by waiver of the right to plead not guilty *and* by waiver of the right to a jury trial." *Alford* v. *North Carolina*, 405 F.2d 340, 346 (4th Cir. 1968).[9]

The North Carolina courts have declined to follow *United States* v. *Jackson* in the present case and other recent cases.[10] The distinction between the respective fact situations and between North Carolina statutes and the Federal Kidnapping Act, which the North Carolina courts in these decisions, and the respondent in his brief in opposition to the petition in the present case, have sought to make, are

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[8] See *Boykin* v. *Alabama*, 37 U.S.L.W. 4474, June 2, 1969.

[9] Justice Bobbitt, dissenting in *State* v. *Spence*, 274 N.C. 536, 545, 553, 164 S.E.2d 593, 598, 603 (1968), addressing himself to the absence of a procedure for trial without a jury in North Carolina, said, "If there be any real difference, it would seem that the pressure upon a defendant to enter a plea that will avoid the 'risk of death' would be greater under our statutes." To the contrary is *State* v. *Forcella*, 52 N.J. 263, 245 A.2d 181 (1968), where it was concluded that *United States* v. *Jackson* applies only when there are two alternative guilt-determining processes and the jury trial alternative produces greater risks for the accused, and that both the Fifth and Sixth Amendment rights must be violated before the statutory scheme would become vulnerable to constitutional attack. This construction of *United States* v. *Jackson* was rejected as illogical in *Alford* v. *North Carolina*, 405 F.2d 340, 345-346 (4th Cir. 1968).

[10] *State* v. *Peele*, 274 N.C. 106, 161 S.E.2d 568 (1968); *State* v. *Spence*, 274 N.C. 536, 164 S.E.2d 593 (1968).

not convincing. One of these positions is that the North Carolina provision for mandatory life imprisonment following a plea of guilty is for the benefit of the defendant and in mitigation of the death penalty, the harsher ordinary sentence for the offense of first degree burglary. It is pointed out that death was the only penalty prescribed for capital felonies in North Carolina, until the jury was given the right to recommend life imprisonment (obligating the judge to impose a sentence of life imprisonment) in 1941 for burglary and arson, and in 1949 for rape and murder,[11] and that the laws were further modified in 1953 to allow a defendant to plead guilty to a capital felony, in which event the life sentence would be imposed automatically.[12] It is pointed out, on the other hand, that the Federal Kidnapping Act, as originally enacted in 1932 contained no capital punishment provision,[13] and that the death penalty was added in 1934.[14] That any difference should result from this distinction is rejected by the case of *Pope* v. *United States,* 392 U.S. 651 (1968), applying the principle of *United States* v. *Jackson* to the death penalty provision of the Federal Bank Robbery Act, 18 U.S.C. sec. 2113(e) (1964), since the legislative history of the Federal Bank Robbery Act shows that as originally enacted, imprisonment and capital punishment were alternative punishments.[15] Moreover, this same argument, that the procedural

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[11] N.C. Session Laws 1941, c. 215, s. 1, 2; N.C. Session Laws 1949, c. 299, s. 1, 4.

[12] N.C. Session Laws 1953, c. 616.

[13] 47 Stat. 326 (1932).

[14] 48 Stat. 781 (1934).

[15] 48 Stat. 783 (1934).

system could be sustained because it was designed to benefit defendants who pleaded guilty, was advanced in *United States* v. *Jackson*, and it was explicitly rejected by the Court:

> The Government suggests that, because the Act thus operates "to mitigate the severity of punishment," it is irrelevant that it "may have the incidental effect of inducing defendants not to contest in full measure." We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.
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> —390 U.S. at 582.

A second of these positions is that under the North Carolina system there is rigid court supervision before the guilty plea may be entered. True, the provision for submitting a guilty plea to a capital felony may be invoked only upon written application by the defendant, through counsel, with acceptance by the state, and approval by the court; and of course the state may refuse to accept the plea, and the judge may decline to approve it. It has not been shown, however, that these procedures are any less effective in protecting the defendant who acts with too much haste or who acts ill-advisedly in submitting a guilty plea, than Rule 11 of the Federal Rules of Criminal Procedure, under which the Federal Kidnapping Act is administered. Under Rule 11 the court may refuse to accept a plea of guilty, the court shall not accept a plea of guilty without first addressing the defendant personally and determining that

the plea is made voluntarily and with an understanding of the nature of the charge and the consequences of the plea, and the court shall not enter judgment upon a plea of guilty without being satisfied that there is a factual basis for the plea. The presence of rigid court supervision for guilty pleas in North Carolina is no point of distinction at all, because guilty pleas are policed with fully as much, if not more, care under the requirements of Rule 11 in the federal courts.

The third of these positions is that *United States* v. *Jackson* invalidates only the death penalty provision of the Federal Kidnapping Act, and has nothing to do with guilty pleas. This argument completely ignores the theoretical basis for the decision in *United States* v. *Jackson*. It was only because the statute was designed in such a way as to discourage the exercise of the rights not to plead guilty and to have a jury trial, that the provision for capital punishment in the statute was invalidated. By treating the death penalty clause as severable, the Court was able to strike out this portion of the statute and leave the balance intact. There are other methods of altering the statutory system, which apparently would have the effect of eliminating the defect. One alternative would be to do away with the guilty plea altogether and have all cases tried by jury. (This method was chosen by the 1969 Session of the North Carolina General Assembly.[16]) Another alternative would be to empanel a jury to fix sentences in cases of guilty pleas, as well as in cases of not guilty pleas.[17]

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[16] See n. 7, *supra*.

[17] See e.g., *Scarber* v. *State*, 226 Ark. 503, 291 S.W.2d 241 (1956); Wash. Rev. Code, secs. 9.48.030, 10.01.060, 10.49.010 (1956).

The only legitimate inquiry in this case is not whether the law of *United States* v. *Jackson* applies to *any* case in North Carolina in which a life sentence has been imposed upon a guilty plea to a capital felony, but whether this law applies to the *particular case* in question.

To begin with, the statutory system under which petitioner was convicted and sentenced, under objective scrutiny, must be regarded as creating a presumption that a defendant subjected to its terms has been unduly influenced against the assertion of his Fifth and Sixth Amendment rights to such an extent that his guilty plea is involuntary. This Court stated, "The *inevitable effect* of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *United States* v. *Jackson,* 390 U.S. at 581 (emphasis added).

At the same time the Court is of the opinion that not every defendant who enters a guilty plea to a charge under a statutory system with this defect does so involuntarily. *United States* v. *Jackson,* 390 U.S. at 583.

A resolution of whether the law of *United States* v. *Jackson* requires the guilty plea and sentence to be set aside in a particular case, necessitates an examination of the attendant facts and circumstances, just as in other instances where coerced pleas and coerced confessions are alleged. This in fact is the conclusion of *Alford* v. *North Carolina,* 405 F.2d 340 (4th Cir. 1968).[18]

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[18] Accord, *Laboy* v. *New Jersey,* 266 F. Supp. 581 (D.C.N.J. 1967).

The relevant circumstances in the present case include the fact that petitioner was 15 years old at the time of his conviction. Petitioner had failed his last year in school. Obviously his background and general experience were very limited. According to a medical résumé from Central Prison, petitioner was an uninhibited and impulsive individual, who would likely become involved in any direct behavior pattern that presented itself as a means of securing his immediate goals. Surely avoidance of the gas chamber became an immediate goal to the petitioner in the awesome and austere surroundings of the Superior Court of Halifax County, and the guilty plea emerged as a direct behavior pattern that became apparent as a means of securing this goal. Petitioner's trial attorney, called as a witness for the State in the post conviction proceeding, testified that he had told the petitioner that if he pleaded not guilty, he would receive the death penalty unless the jury recommended mercy, but that by pleading guilty he would receive a life sentence. It was counsel's advice to petitioner to plead guilty. Petitioner signed an affidavit, which had been prepared for him by his lawyer, before submitting his guilty plea; the affidavit stated, "I know this is a capital case. I also know that if I plead guilty I will be sentenced to life imprisonment." [19] Finally, in evaluating the voluntariness of petitioner's guilty plea in the light of the principles enunciated in *United States* v. *Jackson,* consideration must

[19] While the courts below have chosen to believe the State's evidence where it is contradictory to petitioner's evidence, it is interesting to notice that preying on the mind of petitioner's mother, Viola Parker, who was with petitioner in an anteroom of the court for most of the two days preceding the taking of petitioner's plea, and who agreed to the guilty plea, was the thought that petitioner would be executed if he did not plead guilty (App. 52, 54).

be given at the same time to other factors militating against the voluntariness of the plea, as outlined in Part III of this brief.

Petitioner contends that the involuntariness of the guilty plea in this case has been established as a matter of law,[20] on the ground of petitioner's youth, limited experience, mental aberration, and the admitted advice and encouragement by his counsel, when superimposed upon the inherently coercive nature of the statutory structure. In the alternative, it is petitioner's position that this case should be remanded to the Court of Appeals of North Carolina for further proceedings to determine whether the guilty plea was involuntary in the light of *United States* v. *Jackson,* since the Court of Appeals in the decision here under consideration incorrectly determined that *United States* v. *Jackson* was not relevant to the case.

Because of the magnitude of the deficiency in a statutory system which allows defendants to escape the gas chamber only by surrendering their rights to have jury trial and to be free from compulsory self-incrimination, and the likelihood that this deficiency ordinarily will have some substantial effect on a defendant's willingness to enter a guilty plea, the standard for evaluating the facts of the case on remand, should be the standard enunciated by this Court in *Chapman* v. *California,* 386 U.S. 18 (1967), in relation to the harmless error doctrine, where it was held that the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction.

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[20] *Alford* v. *North Carolina,* 405 F.2d 340, 347-349 (4th Cir. 1968).

B. United States v. Jackson Should Be Applied Retroactively to This Case.

The next question that must be considered is whether the petitioner should be accorded retroactive relief in this case. The criteria which this Court has developed for guidance in determining whether a newly enunciated constitutional standard should be retroactive are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

The first of these criteria is by far the most important one. "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist* v. *United States,* 394 U.S. 244, 249 (1969). Where the newly developed constitutional standard affects the fundamental fairness of the proceeding, and, especially, where it may have a substantial bearing on the correctness of the determination of guilt or innocence, where the integrity of the fact-finding process is in question, the court is inclined to declare the rule retroactive. On the other hand, where the primary effect of the new rule is to cleanse criminal proceedings of conduct by police or officers of the court which infringe upon defendants' constitutional rights but do not have a great probability of affecting the fact-finding process adversely, the Court is inclined to provide that the rule operates only prospectively. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

Accordingly, the Court has held non-retroactive the exclusionary rule for evidence obtained by unreasonable

searches and seizures, *Linkletter* v. *Walker,* 381 U.S. 618 (1965), since such evidence is not unreliable, and the purpose of the rule was to discourage police from conducting unlawful searches and seizures;[21] the rule excluding confessions obtained without the requisite warnings and provisions for counsel, in *Johnson* v. *New Jersey, supra,* because it was thought that the outlawed police conduct did not have great likelihood of producing false confessions, and since pre-existing rules were available to suppress confessions which were the product of more extreme forms of police conduct and hence more likely to be unreliable; the right of counsel during pre-trial lineups and other identification procedures, in *Stovall* v. *Denno,* 388 U.S. 293 (1967), because the Court was primarily concerned with enforcing the right of counsel and did not believe that the accuracy of the identification was substantially lessened in the absence of counsel; the prohibition of prosecutors and judges to comment adversely on the failure of a criminal defendant to testify, in *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966), because the basic thrust of the rule was to discourage courts from penalizing the use of the privilege against self-incrimination, and it was not found that there were great probabilities of subverting the fact-finding process; and the right of jury trial in state criminal cases, in *De Stefano* v. *Woods,* 392 U.S. 631 (1968), on the premise that trials by judges are not demonstrably less fair than trials by juries.

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[21] Similarly the Court held non-retroactive in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), the rule that evidence obtained in violation of Section 605 of the Federal Communications Act is inadmissible, and in *Desist* v. *United States,* 394 U.S. 244 (1969), the rule that evidence acquired by warrantless electronic eavesdropping cannot be introduced.

Consistent with these same distinctions are the cases in which the Court has held newly developed rules to be retroactive, including the right of counsel at the trial of serious cases, *Doughty* v. *Maxwell,* 376 U.S. 202 (1964), because the lack of assistance of counsel at trial almost invariably denies a fair trial;[22] the right to have coerced confessions excluded from the consideration of the jury, *McNerlin* v. *Denno,* 378 U.S. 575 (1964), since the psychological effect upon the jury of a defendant's confession is likely to have great weight in the deliberations of the jury; the right of confrontation and cross-examination of witnesses for the prosecution, in *Berger* v. *California,* 393 U.S. 314 (1969), because of a likely significant effect of these rights on the fact-finding process; the exclusion of co-defendant's inculpatory statements, in *Roberts* v. *Russell,* 392 U.S. 293 (1968), because of the strong probability that such statements would unduly influence the jury; and the right to have a jury from which persons with general opposition to capital punishment have not been excluded, in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) (where the defendant has been sentenced to death), because such exclusion has an undermining effect on the process that decides defendant's fate.

The question of whether or not to extend retroactive application in each case requires an examination of the peculiar traits of the specific rule in question, and a judgment as to the matter of degree to which the fact-finding process is likely to be affected. The greater the likelihood

[22] Similarly the Court applied retroactively the right to counsel on appeal, *Anders* v. *California,* 386 U.S. 738 (1967); right to counsel on taking of a guilty plea, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968); right to counsel at probation revocation hearing, *McConnell* v. *Rhay,* 393 U.S. 2 (1968).

of undermining the fact-finding process, the more the Court is inclined to fix its attention on the purpose to be served by the new standard, and to disregard the lesser criteria, of reliance by law-enforcement authorities and effect upon administration justice. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

A plea of guilty "is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927). By pleading guilty in this case, petitioner did not give up only a single constitutional right, such as the right to exclude a forced confession, or the right to keep out evidence seized in an unlawful search. By pleading guilty, petitioner surrendered virtually every right and privilege encompassed by criminal procedural due process. He yielded the right of trial by jury, the right of cross-examination and confrontation, the right to compel the attendance of witnesses in his own behalf, the right to be heard in his own defense, the right to be free from compulsory self-incrimination, the right to require the state to establish criminal conduct on his part and prove this beyond a reasonable doubt. It is noteworthy that among these rights surrendered by the petitioner, that of confrontation and cross-examination is in itself regarded as having such a potential effect on the validity of the guilt-determining process that it has been accorded retroactive application. *Berger* v. *California, supra.* The elimination of not one, but virtually all, of the criminal due process guarantees, compounds and strengthens the likelihood of unfairness to the petitioner and perversion of the guilt-determining process. The defendant's knowledge that he is innocent of the crime

charged, would in many cases be insufficient to deter him from pleading guilty, when he has the knowledge that a not-guilty plea carries the threat of death, while a guilty plea assures his life will be spared.

It is especially appropriate to contend for retroactive effect of the law of *United States* v. *Jackson,* if, as petitioner anticipates, there will be a requirement in cases concerning the application of this law to guilty pleas, that relief be allowed only in those instances where the state cannot satisfactorily establish that the defective statutory structure did not contribute to the offering of the guilty plea. If the law of *United States* v. *Jackson* is to operate in this manner, in each case where relief will be granted, the fact-finding process necessarily will have been undermined, and a classic situation for retroactivity will have been developed.[22a]

Next must be considered the other criteria outlined in *Stovall* v. *Denno,* 388 U.S. 293 (1967), for determining whether a newly declared constitutional right should be deemed retroactive. It is conceded that courts and officers

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[22a] Since petitioner is not contending here for retroactive application of *United States* v. *Jackson* as a per se rule to upset guilty pleas in every case, the case is in a different posture from *Holliday* v. *United States,* 37 U.S.L.W. —— (May 5, 1969), where retroactivity was denied to the recently declared rule that guilty pleas accepted in violation of Federal Rules of Criminal Procedure, Rule 11, would be set aside. In *Holliday* v. *United States* it was proved by the Government by ample evidence that petitioner's guilty plea was voluntary, despite the court's failure to comply with Rule 11; voluntariness has not been established by the State in the present case. Another point of distinction is that Rule 11 is simply a refinement of traditional safeguards for assuring the validity of guilty pleas, whereas the statutory procedure condemned in *United States* v. *Jackson* has an acknowledged tendency to induce guilty pleas. Finally the Rule 11 requirement was not predicated upon constitutional grounds.

of courts did not question the prevailing standards, and assumed it was proper to impose a term of life imprisonment upon a guilty plea, when the defendant by pleading not guilty would risk his life in a jury trial, until *United States* v. *Jackson* was decided. However, the effect of retroactive application upon the administration of justice, is not nearly as substantial as might appear on first impression.

It seems that only North Carolina and eight other States and the federal jurisdiction have statutory structures which would be affected by *United States* v. *Jackson*.[23] Statistical material which is available for some of these States indicates that not an overwhelming number of prisoners would be affected by retroactive application of *United States* v. *Jackson*, and in a great many instances these prisoners would have served so many years of their sentences that it would hardly be worthwhile for the state to expend its resources in retrying them.[24] It is not con-

[23] 18 U.S.C. sec. 1201(a) (kidnapping), 18 U.S.C. sec. 1111 (murder), 18 U.S.C. sec. 2113(e) (bank robbery), 21 U.S.C. sec. 176b (narcotics sales to minors), 42 U.S.C. sec. 2274-76 (atomic secrets); D.C. Code Ann., Sec. 22-2801; La. Code Crim. Proc., Art. 557; N.J. Stat. Ann., 2A:113-3, 4; N.H. Rev. Stat. Ann., 585:4, 5; N.Y. Code Crim. Proc., Sec. 332.1 (before the death penalty was abolished for most crimes in 1965); S.C. Code, Sec. 17-553.4; Tex. Vernon's Ann. Code Crim. Proc., Art. 1.14; Wyo. Stat. Ann., Sec. 6-59.

[24]

State	*Number of Prisoners Serving Life Sentences*	*Number Whose Life Sentences Imposed for Guilty Pleas to Capital Offenses*	*Average Number of Years Served by a Prisoner with a Life Sentence*
(1) United States			
(2) District of Columbia	92	92	—
(3) North Carolina	448	308	13½
(4) Texas	971	305	—
(5) Wyoming	15	5	9
(6) New Hampshire	15	10	18

(*footnote continued on next page*)

templated that every guilty plea made pursuant to the defective statutes would be set aside; an indefinite, but

Average Number of Years Completed by Prisoners Presently Serving Life Terms	*Number of Life Termers Now Eligible or Who Will Be Eligible Within 2 Years, for Parole*	*Source of Data*
(1)		
(2) 8	24	Letter District of Columbia Dept. of Corrections, July 10, 1969
(3) 10½	219	Letter N.C. Dept. of Correction July 16, 1969; and Statement of Jurisdiction, p. 9, *North Carolina* v. *Alford*, No. 50, October Term, 1969
(4) 8	85	Letter Texas Dept. of Corrections, July 18, 1969
(5) 5	15	Letter Wyo. State Prison, July 16, 196
(6) 7⅔	5	Letter New Hampshire State Prison, July 2 1969

* It was stated in *Natale* v. *United States*, 287 F. Supp. 96 (D.C. Ariz. 1968), holding *United States* v. *Jackson* retroactive, that only a handful of persons have been convicted under the Federal Kidnapping Act, 18 U.S.C. 1201(a).

The number of prisoners who might possibly be affected by retroactive application of *United States* v. *Jackson* perhaps should be increased to account for those in the situation of respondent in *North Carolina* v. *Alford*, No. 50, October Term, 1969, who pled guilty to the lesser included offense of second degree murder. At some point on the scale of lesser included offenses, however, the coercive effect becomes too attenuated to be taken into account. See Judge Haynesworth's dissent in *Alford* v. *North Carolina*, 405 F.2d 340, 349-350 (4th Cir. 1968). Alford's 30 year sentence was tantamount to a life sentence; it would seem that any term of years substantially less than life should be the stopping point.

Many of the prisoners eligible or nearly eligible for parole would elect not to bring post conviction proceedings out of fear that this conduct might be regarded by the parole authorities as inconsistent with the appearance of successful rehabilitation necessary for approval of parole.

necessarily considerable, number of prisoners would fail to secure new trials, because the state would be able to prove that the defective statutes did not render involuntary the guilty plea in the particular case. Clearly, the retroactive application of *United States* v. *Jackson* would not have an effect even approaching that of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), yet in this case, as in *Gideon* v. *Wainright*, the possibility of infecting the integrity of the fact-finding process is very great, and the unfairness to the defendant looms large.

III.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Violated by Allowing His Guilty Plea to Stand, When It Followed a Coerced Confession, and There Was No Showing That the Plea Was Not Influenced by the Confession.

The petitioner, then a 15 year old Negro child of humble circumstances, was arrested at gun point and taken to an interrogation room by white police officers. He told the officers he wanted to see his mother and a lawyer. They told him he could not see anyone until he gave them the information they wanted. The petitioner was kept in a cell alone overnight. He was not given anything to eat or drink; no water would come out of the spigot in his cell. During the night petitioner's mother was informed that her son was in custody, but the police told her it would be no use to come to the police station, because under no circumstances would she be allowed to see the petitioner. On the following morning petitioner was again questioned for about an hour, at which time the police secured an oral and written confession of housebreaking from him.

The petitioner's account of these events was not in any way contradicted by the police officers present at the post conviction hearing; the only evidence favorable to the State on this subject was the testimony of petitioner's lawyer, who said that petitioner told him soon after the confession was rendered that he had not been threatened, no promises had been made to him, and he was not scared.

Following his confession, the petitioner was held for a month in the Halifax County Jail. The jail attendants rebuffed efforts of petitioner's sister to visit him during this period.

Petitioner's attorney testified he was with the petitioner and his mother most of the day before the trial and the day of the trial. The petitioner and his mother both signed affidavits to the effect that they knew the nature and seriousness of the charge, they realized a guilty plea would require a sentence of life imprisonment, and they authorized the entry of this plea. Petitioner did not think he would be able to prevent the involuntary confession from being used against him in the event he were to plead not guilty, and the threatened use of this confession was a factor which motivated him to plead guilty. Petitioner's attorney did not remember any discussions with the petitioner about the legality of admitting the confession as evidence; he said he knew that if the confession was not kept out of evidence, the petitioner was "sunk." He advised the petitioner to plead guilty. The petitioner was questioned by the court before the plea was accepted. The court asked petitioner whether any promises were made or force applied to obtain the guilty plea, and whether the plea was being made with any fear or compulsion. Negative

answers to these routine questions were given. There is no indication that the court attempted to determine whether the confession had in any way influenced petitioner's guilty plea.

A psychiatric report showed the petitioner to be lacking in inhibitions against conduct directed towards securing immediate goals. Petitioner had failed the year of school preceding his trial.

The Court of Appeals of North Carolina upheld the finding of the Superior Court that petitioner's confession was voluntary. This conclusion cannot be sustained in the face of several decisions of this Court. The facts are very close to the facts of *Gallegos* v. *Colorado,* 370 U.S. 49 (1962). There a 14 year old defendant, after being taken into custody by the police, admitted at once the perpetration of an assault. The next day he gave a recorded confession, and six days later he signed a written confession. In the interim he was held without seeing a lawyer, his parents, or any friendly adult. His mother tried to see him on the day after the arrest, but she was told it was not a visiting day. In overturning the conviction, the Court said, "Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." 370 U.S. at 54-55.[25]

[25] See also *Haley* v. *Ohio,* 332 U.S. 596 (1948), where it was recognized that the confession of a Negro boy of 15 years cannot be weighed by adult standards of voluntariness.

The confession must also be deemed inadmissible because the police did not give the warnings to petitioner required by *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); on the uncontradicted evidence, the defendant had been taken into custody, he was being interrogated for the purpose of obtaining a confession, he requested and was denied an opportunity to see a lawyer, and the police did not warn him of his absolute right to remain silent. Petitioner's trial was on August 18, 1964, so the rules of *Escobedo* v. *Illinois* were applicable. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

The Court of Appeals of North Carolina concluded that petitioner's confession was voluntary, and hence the court did not address itself clearly to the problem of determining whether the confession in any way influenced the guilty plea. North Carolina subscribes to the rule that where an involuntary confession has been obtained, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received into evidence. *State* v. *Gibson,* 216 N.C. 535, 5 S.E.2d 717 (1939). As this Court has observed, "(A)fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good." *United States* v. *Bayer,* 331 U.S. 532, 540 (1947). The connection between a prior involuntary confession and a later confession must be so attenuated as to dissipate the taint. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). This is a constitutional rule binding upon the states. *Clewis* v. *Texas,* 386 U.S. 707 (1967). Reason requires that the "second confession" rule apply when the second confession

consists of a guilty plea, a judicial confession. Thus in *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 118 (1956), it is said, "(A) conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." On this ground guilty pleas based on coerced confessions were set aside in the case of *Chambers* v. *Florida*, 309 U.S. 227 (1940).[28]

The only evidence in this case bearing on the voluntariness of the petitioner's guilty plea consists of an affidavit procured from petitioner by his attorney to the effect that petitioner understood the charge and sentence and authorized the entry of the plea, and the routine leading questions of the trial judge as to whether the plea was made without any fear, promise, or compulsion. None of this evidence provides any enlightenment about whether the guilty plea was influenced by the coerced confession. The guilty plea, like the second confession, is presumed tainted by the prior coerced confession, and deemed involuntary until the state overcomes this presumption. *Dorsciak* v. *Gladden*, —— Or. ——, 425 P. 2d 177 (1967). It has been held in this connection that the state must prove dissipation of the primary taint beyond a reasonable doubt. *People* v. *Spencer*, 66 Cal.2d 158, 424 P. 2d 715 (1967). This result is consistent with, if not required by, the doctrine of *Chapman* v. *California*, 386 U.S. 18 (1967), holding that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

[28] It is academic that a guilty plea defectively obtained cannot constitute a waiver of any of defendant's rights, here his right to be relieved of the effects of the coerced confession. *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948).

The petitioner contends that in this case the Court of Appeals of North Carolina employed a manifestly incorrect standard by requiring petitioner to prove that "as a matter of law . . . petitioner's guilty plea was the product of his prior confession to the police." (App. 96-97) Here the only probative evidence did not rebut the presumption that the plea was affected by the prior confession, but was supportive of the presumption. Petitioner thought the confession would be used against him, and the threatened use of it influenced him to plead guilty. Petitioner's counsel was afraid the confession would be used, he did not tell petitioner that it could be kept out, and he knew that if the confession were not excluded his client was "sunk."

The determination that petitioner's guilty plea was voluntary cannot be upheld against the plain facts and legal effect of his confession to the police and the month-long detention, especially when considered in light of the inherently coercive features of the statutory procedure providing the guilty plea as the only sure means of escape from the gas chamber.[27]

In the event the Court should determine that *United States* v. *Jackson* is not to be applied retroactively to this

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[27] Some testimony relevant on the question of petitioner's guilt or innocence of burglary and rape was extracted at the post conviction hearing from petitioner, his mother, and his trial attorney, over objection by counsel. The Court of Appeals of North Carolina ruled that admission of this evidence was erroneous, as having no place in a post conviction hearing, the purpose of which is to determine whether petitioner's constitutional rights were violated at trial (App. 99). From petitioner's testimony in this regard, however, it is clear that he believed in his innocence of rape and burglary at the time of trial, and continues to adhere to this belief, in that petitioner understood he was having intercourse with consent of the prosecuting witness (App. 44). This belief, of course, is inconsistent with petitioner's guilty plea.

case, petitioner contends that, nevertheless, his conviction should be set aside because the influence the defective statutory arrangement had on petitioner's guilty plea, when combined with the effect of the confession, would seem to establish that the guilty plea was involuntary, as a matter of law.[28] At least the Court of Appeals of North Carolina should, in the light of a holding of this Court that the statutory procedures are contrary to the law of *United States* v. *Jackson,* be required to reconsider the case on that ground, as well as being required to apply to this case the constitutionally correct standard for assessing the effect of involuntary confessions upon subsequent guilty pleas.

Conclusion

For the reasons stated above, the petitioner respectfully prays that the judgment of the Court of Appeals of North Carolina in this case be reversed and the case be remanded.

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[28] *Davis* v. *North Carolina,* 384 U.S. 737 (1966), stands for the proposition that newly developed constitutional standards, which have been declared to be prospective in effect, while not available for retroactive application per se, may be taken into consideration along with other factors in the situation in determining whether relief should be granted.

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In The

Supreme Court of the United States

October Term, 1969

No. 268

CHARLES LEE PARKER,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA.

BRIEF FOR RESPONDENT

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of North Carolina (A. pp.92-99) is reported at 2 N.C. App. 27, 162 S.E.2d 526 (1968).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I. WHETHER IT IS A DENIAL OF THE PRISONER'S RIGHTS UNDER THE FOURTEENTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN A STATE PROCEEDING, FOR THE PRISONER TO BE PRECLUDED FROM PROVING THE LACK OF JURISDICTION OF THE COURT IN WHICH HE WAS TRIED AND CONVICTED BECAUSE OF RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

WHICH INDICTED HIM, ON THE GROUND OF HIS FAILURE TO MAKE A MOTION TO QUASH THE INDICTMENT, WHEN IT IS UNCONTRADICTED THAT THE PRISONER DID NOT KNOW OF HIS RIGHT TO INDICTMENT BY A GRAND JURY FREE OF RACIAL DISCRIMINATION, AND DID NOT VOLUNTARILY RELINQUISH THIS RIGHT?

II. WHETHER IT IS A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN A STATE PROCEEDING, FOR THE DEFENDANT TO BE CONVICTED AND SENTENCED TO LIFE IMPRISONMENT FOR THE CAPITAL OFFENSE OF BURGLARY, UPON A GUILTY PLEA, UNDER A STATUTORY PROCEDURE WHEREBY A PLEA OF NOT GUILTY INVOLVES THE THREAT OF CAPITAL PUNISHMENT, BUT A PLEA OF GUILTY IMMUNIZES THE DEFENDANT FROM CAPITAL PUNISHMENT, IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT THAT THIS STATUTORY ARRANGEMENT DID NOT INFLUENCE THE DEFENDANT TO PLEAD GUILTY?

III. WHETHER IT IS A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN A STATE PROCEEDING, FOR A PLEA OF GUILTY TO BE ALLOWED TO SUPPORT A CONVICTION AND LIFE SENTENCE FOR THE CRIME OF BURGLARY, WHERE A PRIOR INVOLUNTARY CONFESSION WAS OBTAINED FROM THE DEFENDANT, THE DEFENDANT BELIEVED THIS CONFESSION WOULD BE USED AGAINST HIM IF HE PLEADED NOT GUILTY, AND THE STATE HAS

NOT ESTABLISHED BEYOND A REASONABLE DOUBT A LACK OF CONNECTION BETWEEN THE COERCED CONFESSION AND THE GUILTY PLEA?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of North Carolina:

ARTICLE I, SECTION 13:

RIGHT OF JURY.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal.

General Statutes of North Carolina:

N.C.G.S. §14-52 (1953)

PUNISHMENT FOR BURGLARY.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the Court.

N. C. G. S. § 15-162.1 (1956)

PLEA OF GUILTY OF FIRST DEGREE MURDER, FIRST DEGREE BURGLARY, ARSON OR RAPE. (a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.

(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

(c) Unless and until the State accepts such plea, no reference shall be made in open court at the time of arraignment or at any other time to the tender or proposed tender of such plea; and the fact of such tender shall not be admissible as evidence either for or against the defendant in the trial or at any other time and place. The defendant shall have the right to withdraw such plea, without prejudice of any kind, until such time as it is accepted by the State.

STATEMENT OF THE CASE

At the August 1964 Session of the Superior Court of Halifax County, North Carolina, the petitioner, Charles Lee Parker, pleaded guilty to an indictment charging first degree burglary and was sentenced to life imprisonment. Proceedings were commenced by the filing of a petition verified July 9, 1967, under the North Carolina Post-Conviction Hearing Act, N.C.-G.S. 15-217, et seq., in the Superior Court of Halifax County (A. pp. 2-7) and petitioner was provided with a full and fair evidentiary hearing, with the assistance of counsel, Norman Smith, Esq., before the Honorable Joseph W. Parker, Judge Presiding. After a full and fair evidentiary hearing, Judge Parker entered a Judgment dated December 19, 1967, denying post-conviction relief. (A. pp. 27-30) Petitioner sought a Writ of Certiorari to review Judge Parker's Judgment denying post-conviction relief and Norman Smith, Esq., was court-appointed to represent the petitioner upon his petition for Writ of Certiorari to the North Carolina Court of Appeals. (A. p. 30) On March 14, 1968, the North Carolina Court of Appeals allowed the petition for Writ of Certiorari. (A. p. 38) On August 14,

1968, the North Carolina Court of Appeals affirmed Judge Parker's Judgment denying petitioner a new trial. CHARLES LEE PARKER v. STATE OF NORTH CAROLINA, 2 N.C. App. 27, 162 S.E.2d 526 (1968). (A. pp. 92-99)

On Thursday night, July 16, 1964, about 11:00 P.M., the petitioner, Charles Lee Parker, was arrested by officers of the Roanoke Rapids, North Carolina, Police Department as he walked into the yard and went up to a door of a house in Roanoke Rapids. On the preceding Sunday night at approximately 11:00 P.M., this house had been broken into and a female occupant raped. Petitioner was arrested and taken to the Roanoke Rapids Police Station where he was questioned. He refused to tell his name or where he was from. The questioning continued for an hour or two and afterwards petitioner was placed in a cell for the remainder of the night. He was not fed during the night. Sometime that night the police ascertained sufficient information of petitioner's identity and about 4:30 A.M., i.e., within six hours of petitioner's arrest, his mother was notified that he had been arrested. The following morning he was again questioned for about an hour, at which time he signed a confession. Early that morning the petitioner's mother employed the services of an attorney in Roanoke Rapids, George L. Cranford, Esq., who went to the Roanoke Rapids Police Station and talked with petitioner who told counsel that he had already confessed to the police. The attorney questioned petitioner as to whether, when he made the confession, had he been threatened in any manner, whether any promises were made to him, and whether he was scared at the time he made the statement. (A.pp. 66-67). Petitioner told counsel that no threats or promises had been made, and that he was not scared. (A.p.67). Drinking water was given petitioner the second time he was interrogated and two sandwiches after he had confessed. These events occurred prior to counsel's interview with petitioner, and counsel talked to petitioner the morning of July 17, 1969 between 9:30 and 10:30 A.M. (A. p. 71).

At the trial at the August 1964 Term of the Halifax County Superior Court, petitioner's mother was present and counsel discussed with her and the petitioner the nature and seriousness of the charge of first degree burglary against petitioner, and both Mrs. Viola Parker, petitioner's mother, (A. pp. 67-68) and the petitioner (A.p.68) signed written statements authorizing the entry of a plea of guilty to first degree burglary. At the time these statements were signed, petitioner and his mother realized that by entering such a plea he would be sentenced to life imprisonment pursuant to the provisions of N.C.G.S. 15-162.1. In his statement he also acknowledged that he had not been threatened or abused in any manner by any person and that no promises had been made to him if he pleaded guilty to any charge. Petitioner's signing of the statement was witnessed by Charlie D. Clark, Jr., Esq., an Attorney at Law of Roanoke Rapids, North Carolina, who wanted to be absolutely certain that petitioner knew what he was doing and the consequences of his act. (A. p. 73).

The tender of the plea of guilty was accepted by both the State and the Court, and prior to imposing sentence, the Judge Presiding at the trial examined the petitioner and his mother and made a finding that the petitioner understood the import of his plea and that it was made freely and voluntarily. (A. pp 46-47). Upon acceptance of the plea of first degree burglary, a capital offense, a mandatory life sentence was imposed.

SUMMARY OF THE ARGUMENT

I.

THE PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE NOT ABRIDGED IN DISMISSING HIS CHALLENGE TO THE GRAND JURY WHICH HAD INDICTED HIM.

A. Petitioner's evidence does not establish the use of discriminatory practice.

Petitioner bases his claim of discriminatory jury practice

solely upon a statistical break-down of the population of Halifax County, North Carolina, and the percentage of Negro citizens who had previously served on grand juries. The only witness presented by petitioner rebutted the contention that there was intentional, arbitrary or systematic discrimination on account of race. Petitioner totally failed to reveal discriminatory jury practices since there was not one iota of evidence that the jury commissioners applied different standards of qualifications to the negro community than they did to the white community.

B. Petitioner has waived his right to quash the indictment when the issue of improper grand jury selection is first raised at a post-conviction hearing more than three years after his conviction.

Petitioner tended a plea of guilty in writing to the capital offense of first degree burglary. The petitioner did not, prior to the entry of the plea, move to quash the indictment based upon disqualification of members of the grand jury, as he may have done pursuant to the provisions of N.C.G.S. 9-23. Petitioner had been represented by counsel from early in the morning following his arrest, and counsel had spent two days with petitioner, and petitioner's mother, prior to the trial and the entry of the plea. It was not until three years after the entry of the plea that petitioner, in a petition for post-conviction hearing filed in the Halifax County Superior Court, first questioned the composition of the grand jury that had indicted him.

II.

THE MERE FACT THAT A DEFENDANT ENTERS A GUILTY PLEA TO A CAPITAL OFFENSE THEREBY INSULATING HIMSELF FROM THE IMPOSITION OF CAPITAL PUNISHMENT DOES NOT INVALIDATE THE GUILTY PLEA.

As stated by this Court in UNITED STATES v. JACKSON, "The fact that the Federal Kidnaping Act tends to discourage

defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily . . ." A review of this case reveals that none of petitioner's rights had been violated, and that his plea of guilty was freely, understandingly and voluntarily made. Petitioner has totally failed to show any coercion by the State, solely claiming that the statutory scheme caused his plea to be involuntary.

A. The Jackson Decision should not be retroactively applied.

The effect would be devastating if this Court were to retroactively apply its holding in UNITED STATES v. JACKSON. The statutory scheme condemned in JACKSON had been relied upon in many of the States and by the Federal Authorities. To now require that every conviction of a defendant who pled guilty when charged with a capital offense to be set aside, would be disastrous.

III.

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FIFTH AMENDMENTS WERE NOT VIOLATED, HIS CONFESSION WAS NOT COERCED AND HIS GUILTY PLEA WAS NOT INVOLUNTARY.

Petitioner has been afforded a full and fair evidentiary hearing on all of these contentions, and after having had the opportunity to present his evidence, it is crystal clear that there is absolutely no merit to his contentions, as the Judge Presiding at the post-conviction hearing, has found. The evidence presented at the post-conviction hearing clearly indicates that none of the petitioner's rights have been violated.

I.

THE PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE NOT ABRIDGED IN DISMISSING HIS CHALLENGE TO THE GRAND JURY WHICH HAD INDICTED HIM.

(a) PETITIONER'S EVIDENCE DOES NOT ESTABLISH THE USE OF DISCRIMINATORY JURY PRACTICE.

In the post-conviction judgment entered by the Honorable Joseph W. Parker, Judge Presiding at the post-conviction hearing, the court, after a full and fair evidentiary hearing, found as a fact:

> ". . . that the petitioner defendant was tried at said August Term, 1964, upon a bill of indictment returned by a properly and legally constituted grand jury, nine of which were selected at the first term of Halifax County Superior Court at the beginning of the spring session of 1964, and nine at the beginning of the fall session of said Court by a child under ten years of age from the regular jury panel summoned, at each term; that there was one Negro present on the grand jury which returned said bill of indictment a true bill; that there has been no systematic or purposely exclusion of persons of any race in selection of those for jury service by the Board of Commissioners of Halifax County; that said Commissioners have excluded from jury service persons white, Negro, Indian and others who in its opinion were infirmed in body or mind, had been convicted of felonies, or otherwise incompetent under the applicable provisions of law in North Carolina; . . ." (A. pp. 28-29)

At the post-conviction hearing, petitioner's witness, Frank D. Wilson, Register of Deeds of Halifax County, North Carolina, described how the jury and grand jury of that County were selected (A. pp. 55-58). It is clearly shown by petitioner's witness that the statutory procedure for the selection of jurors had been followed, and that the only place there had been a racial designation was on the tax books from which the names were taken. No racial designation appeared on the jury list from which the petit or grand jury was selected.

During the period of January 1960 through August 1964, ninety-nine grand jurors had been drawn and of these eight were Negro. No names were discarded because of race from the

jury box, for there was nothing to indicate race in the names in the jury box. When the jury commissioners were selecting the jury list from the tax records, no names were kept off the list because of race. The Commissioners, in accordance with N.C.G.S. 9-1 selected names on the basis of persons having good moral character, never convicted of a crime involving moral turpitude and who had sufficient intelligence to serve.[1] The Commissioners, who are selected from different districts in the county, selected persons known to them, and, on occasion, asked the Deputy Sheriffs and Tax Collector about the qualifications of persons not known to the Commissioners.

It is petitioner's contention that statistical evidence showing the presence of alleged discriminatory jury practices and the facts that the county tax lists from which the jury lists were made had racial designations established a prima facie case of systematic exclusion of members of petitioner's race from the grand jury which had indicted him. These facts would appear to bring the case within the holdings of this Court in WHITUS v. GEORGIA, 385 U.S. 545; JONES v. GEORGIA, 389 U.S.

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1 In 1964, N.C.G.S. 9-1 provided:

§ 9-1. Jury list from taxpayers of good character.—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

24, and SIMS v. GEORGIA, 389 U.S. 404, and place the burden upon the State to go forward with evidence. However, it is obvious that petitioner has not made out a prima facie showing of discrimination, unless the mere fact that relatively few Negroes had served on the jury is sufficient. Even so, it appears that petitioner's own witness rebutted this contention that there was intentional, arbitrary or systematic discrimination on account of race.

An examination of the evidence will show that petitioner's evidence indicates not the use of discriminatory jury practices, but what appears to be a method of jury selection somewhat similar to a blue ribbon method. Admittedly, a blue ribbon method jury selection has been found to be unconstitutional in the federal system, but there is no holding to be found declaring the use of such practices by a State to be unconstitutional. The Jury Commissioners in selecting names for the jury lists chose people, in accordance with the applicable statutes, whom they knew or were told to be of good moral character and of sufficient intelligence. While the tax lists were maintained in a segregated fashion, the jury lists were not. This being the case, no names could have been excluded or discarded from the jury lists because of race.

In SWAIN v. ALABAMA, 380 U.S. 202, 209, this Court stated that: ". . . an imperfect system is not equivalent to purposeful discrimination based upon race." When viewed in this light, we submit that petitioner has totally failed to sustain his burden of proving discriminatory jury practices since there is no evidence that the jury commissioners applied different standards of qualifications to the Negro community than they did to the white community.

(b) PETITIONER HAS WAIVED HIS RIGHT TO QUASH THE INDICTMENT WHEN THE ISSUE OF IMPROPER GRAND JURY SELECTION IS FIRST RAISED AT A POST-CONVICTION HEARING MORE THAN THREE YEARS AFTER HIS CONVICTION.

North Carolina General Statute 9-23 provides:

"Exceptions to qualifications of grand jurors.—All exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived . . ."

Almost seventy years ago the Supreme Court of North Carolina clearly stated that the North Carolina Constitution required the sustaining of a motion to quash an indictment of a negro who proves that members of his race had been systematically excluded from the juries of the county in which he had been indicted. STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814 (1902). Since 1902 it has never been doubted by the courts of the State of North Carolina that the systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by the grand jury. However, an objection to an indictment based on defects or irregularities in the drawing or organization of the grand jury must be taken by a motion to quash the indictment and may be made as a matter of right up to the time when the defendant is arraigned and enters his plea. The presiding judge has the discretionary power to permit the defendant to make the motion to quash the indictment as a matter of grace after the plea is entered and until the petit jury is sworn and impaneled to try the case on its merits. MILLER v. NORTH CAROLINA, 237 N.C. 29, 74 S.E.2d 513 (1953); NORTH CAROLINA v. GALES, 240 N.C. 319, 82 S.E.2d 80 (1954).

The Federal Court counterpart of N.C.G.S. 9-23 is Rule 12(b) (2) of the Federal Rules of Criminal Procedure which provides:

"Defenses and Objections based on defects in the institution of the prosecution or in the indictment or information

other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

In JACKSON v. UNITED STATES, 394 F.2d 114 (5th Cir. 1968), a case similar to this, the Court said:

". . . He is likewise barred from raising the question of the composition of the grand jury on the allegation of racial exclusion, being required by Rule 12(b) (2) of the Federal Rules of Criminal Procedure to allege such a defect by motion before trial, which he did not do then or at any other time during the proceeding on the merits. His failure to do so constitutes a waiver thereof so that he may not now, for the first time, more than two years after his trial, question the composition of the grand jury which indicted him . . . SHOTWELL MANUFACTURING CO. v. UNITED STATES, 371 U.S. 341, 83 S. Ct. 448, 9 L.Ed.2d 357 (1963); PEREZ v. UNITED STATES, 5 Cir., 1962, 303 F.2d 441; PINKNEY v. UNITED STATES, 5 Cir., 1967, 380 F.2d 882."

Petitioner contends that he has not waived the right to have the indictment quashed because he did not "intentionally relinquish or abandon a known right or privilege." JOHNSON v. ZERBST, 304 U.S. 458, 464 (1938). N.C.G.S. 9-23 expressly states that "all exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived." If the intent to relinquish this right cannot be in-

ferred from the failure to assert the right, as required by statute, this State, all states and the federal government would be faced with the intolerable burden of showing the subjective state of a defendant's mind. The courts would be overwhelmed with defendants parading into court demanding new trials because it had not been their "considered choice" to waive their right to attack grand jury selection. While it is important that a defendant be convicted of crime in accordance with applicable constitutional requirements, it is equally important that reasonable diligence be required to the end that convictions may some day become final. The convicted person should not be permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands, before bringing his constitutional claims to the attention of a court. States have a right to assume that transactions are closed and settled within a reasonable time, and to rely upon finality of judgments.

The petitioner attempts to show that North Carolina's decisions in this area are inconsistent. A reading of the two cases cited by petitioner, NORTH CAROLINA v. RORIE, 258 N.C. 162, 128 S.E. 2d 229 (1962), and NORTH CAROLINA v. COVINGTON, 258 N.C. 501, 128 S.E. 2d 827 (1963) reveal they are not inconsistent. In RORIE the Supreme Court of North Carolina simply held that a motion to quash the indictment that is not seasonably made is waived. In COVINGTON the defendant did seasonably make his motion to quash the indictment, but later pled guilty. The Court held that the guilty plea standing alone was insufficient to show a waiver of the defendant's right to have the motion to quash duly heard. There is no inconsistency in these cases since in one the motion was seasonably made and in the other it was not.

II

THE MERE FACT THAT A DEFENDANT ENTERS A GUILTY PLEA TO A CAPITAL OFFENSE THEREBY INSULATING HIMSELF FROM THE IMPOSITION OF

CAPITAL PUNISHMENT DOES NOT INVALIDATE THE GUILTY PLEA.

In UNITED STATES v. JACKSON, 390 U.S. 570 (1968) the selective death penalty provision of the Federal Kidnaping Act imposed an "impermissible burden upon the assertion of a Constitutional right". We submit the decision in JACKSON is limited to the statutory scheme established by the Federal Kidnaping Act and does not have wider applicability.

The Federal Rules of Criminal Procedure permit a defendant to plead guilty, or plead not guilty and be tried by a jury, or plead not guilty and waive a jury trial. (See Rule 23 (a) of the Federal Rules of Criminal Procedure.) Thus the defendant charged with kidnapping who asserts his right to a jury trial, faces "the risk of death" as the price of his "free exercise" of the Constitutional right. UNITED STATES v. JACKSON, *supra.*

A Federal jury trying a defendant pursuant to the provisions of the Kidnaping Act, until the JACKSON case, acted in a dual capacity. The jury was the trier of the facts, determining either guilt or innocence. If the jury found the defendant guilty, it then possessed the authority to designate the death penalty, thereby increasing the punishment imposed upon the defendant beyond the authority granted to the court in sentencing the convicted defendant.

The North Carolina Constitution, Article 1, Section 13, prohibits a trial upon a plea of not guilty "but by the unanimous verdict of a jury of good and lawful persons in open court . . ." This right cannot be waived. The defendant cannot plead not guilty and waive a jury trial. The determinative facts must be found by a jury. STATE v. MUSE, 219 N. C. 226, 13 S.E.2d 229 (1941); STATE v. HILL, 209 N. C. 53, 182 S.E. 716 (1935).

A defendant charged with a capital crime (first degree murder, first degree burglary, arson and rape) may plead not guilty and be tried by a jury, or he may plead guilty, and if

the court accepts the plea, the defendant must be sentenced to life imprisonment.[2] (See p. 4, *supra*). If the defendant pleads not guilty and if jury finds him guilty, the penalty is death unless the jury recommends mercy. (p. 4, *supra*)

The death sentence is imposed by statute upon the jury's finding the defendant guilty of a capital crime. The jury is not, as in the JACKSON case, usurping the province of the judge in sentencing the defendant, but serving as the trier of the facts. However, the jury is given the discretion in each of the capital crimes to recommend life imprisonment. This procedure parallels 18 U.S.C.A., Section 1111, wherein the penalty for murder in the first degree within Federal Jurisdiction is death, unless the jury qualifies its verdict with the words "without capital punishment," in which event the penalty is life imprisonment. The North Carolina jury in a capital case, as a Federal jury in a first degree murder case, is given the power to eliminate the automatic imposition of the death penalty upon a conviction of a capital crime.

The ability of the jury to mitigate the statutory punishment is contra to the unconstitutional burden imposed upon the defendant in the Federal Kidnaping Act. The North Carolina capital jury is given the ability to recommend mercy upon a capital conviction. The Federal jury, and only the jury, upon a conviction for kidnaping had the ability to impose the death penalty, rather than permit the court to impose a sentence for any term of years or for life.

In reviewing the difference between the Federal Kidnaping Act and the North Carolina Statutes, the Supreme Court of North Carolina in STATE OF NORTH CAROLINA v. OTIS EUGENE PEELE, 274 N. C. 106, 111, 161 S.E.2d 568, 572 (1968) stated:

"We think there are certain material differences in the

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[2] N.C.G.S. 15-162.1 (plea of guilty of first degree burglarly, arson or rape) was repealed by the 1969 Session of the North Carolina General Assembly on March 25, 1969. (Session Laws 1969, Ch. 117)

Federal Kidnaping Act and in North Carolina Statutes 14-21 and 15-162.1, and that JACKSON is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnaping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides that the death penalty shall be ordered unless the jury, at the times it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G. S. 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty, which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute. Except as provided in G. S. 15-162.1, the North Carolina practice will not permit a defendant to plead guilty to a capital felony. G. S. 15-187 provides the death sentence shall be executed '. . . against any person in the State of North Carolina *convicted* of a crime punishable by death . . .' (Emphasis added.)

"G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the JACKSON case, there are 'defendants who would greatly prefer not to contest their guilt.' Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty. The possibility of a death penalty, however, has deterring effect—how much, no one knows . . ."

Additionally, an examination of the legislative history of the Federal Kidnaping Act and of the various North Carolina Statutes further reveal the inapplicability of JACKSON. The Federal Kidnaping Act as originally enacted in 1932, contained no provision for capital punishment. The 1934 amendment inserted the provision authorizing the death penalty "if the verdict of the jury shall so recommend." The decision in JACKSON held this amendment unconstitutional. Prior to 1934 a defendant could contest his guilt without risk of death. Under the 1934 amendment he could not.

Until 1949, the death penalty was automatically imposed in North Carolina upon a defendant convicted of a capital offense. The defendant, if convicted of a capital offense, received the only sentence permitted by law, death. However, in 1949, the proviso was added by amendment to each capital offense permitting the jury to recommend life imprisonment.

N.C.G.S. 15-162.1 permitting the entry of a guilty plea to a capital offense was not enacted until 1953. Prior to 1953, a capital defendant could not plead guilty to the capital charge. It is evident that N.C.G.S. 15-162.1 and the provisos added in 1949 to the various capital crimes permitting the jury to recommend life imprisonment are separate and distinct legislative provisions.

The North Carolina statutory scheme consisted of separate, distinct statutes, passed at separate times and each capable of standing alone, unlike the unitary scheme presented in the Kidnaping Act.

In JACKSON, supra, this Court held the infirmity of the death penalty provision of the Federal Kidnapping Act severable from the remainder of the Act, leaving the remainder in full force, and remanded for the entry of a plea free from the burden of the death penalty. In POPE v. UNITED STATES, 392 U.S. 651, 20 L. ed.2d 1317, 88 S. Ct. 2145, based upon JACKSON, this Court held the death penalty provisions of the Federal Bank Robbery Act (18 U.S.C. Sec. 2113(e)) was

invalid but the remainder of the Statute, the death penalty provision being separable, was valid. In JACKSON the defendant was yet to enter a plea to the indictment and in POPE the defendant was convicted by a jury and sentenced to death. Neither case is authority for the issue here presented. "Are all pleas of guilty in a statute containing a JACKSON type defect invalid?" We submit not. JACKSON is not authority for a conclusion of such broad constitutional impact and should not be applied to void every conviction where a defendant has entered a guilty plea. This Court stated in JACKSON that the Kidnaping Act "needlessly" penalized a defendant who stood on his right to plead not guilty before a jury—and Mr. Justice Stewart stated that defendants who acknowledged their guilt and wish to avoid the ignominy of public trial have traditionally been allowed to plead guilty, and, in addition, that a flexible and efficient judicial system requires the use of guilty pleas.

N.C.G.S. 15-4.1 provides, inter alia:

> ". . . , but a defendant without counsel cannot plead guilty to an indictment charging a capital felony . . ."

The right to counsel in capital felonies has been recognized in North Carolina since the very establishment of this State. In STATE v. HEDGEBETH, 228 N.C. 259, 45 S.E. 2d 563 (1947), the North Carolina Supreme Court said:

> "The Constitution of North Carolina, Art. I, sec.11, contains this provision: 'In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees or necessary witness fees of the defense, unless found guilty.' And this constitutional provision is further implemented by statute (G.S., 15-4) in these words: 'Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (Session Laws 1777, C. 115).

"In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G.S. 15-5, and by numerous decisions of this Court . . ." (Emphasis added)

In JACKSON, the issue arose in the context of a burden being placed upon a plea of not guilty where only a jury trial upon that plea, but not a bench trial, could result in the death penalty. JACKSON is authority to void a scheme such as that presented in the Kidnaping Act, which burdened a defendant's right to a jury trial upon a plea of not guilty. It is not authority to hold invalid guilty pleas.

In JACKSON, this Court said:

> ". . . the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily . . ."
>
> 390 U.S. at 583.

The Opinion concludes:

> ". . . By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the Statute an operative whole, free of any constitutional objection. The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority."
>
> 390 U.S. at 591.

In light of various safeguards imposed prior to the acceptance of such pleas, this Court should not void pleas entered in a procedure so firmly entrenched in the history of the judicial system.

A. THE JACKSON DECISION SHOULD NOT BE RETROACTIVELY APPLIED.

The rule relating to retroactivity was stated by this Court

in STOVALL v. DENNO, 388 U.S. 293, 18 L. Ed.2d 1999, 87 S.Ct. 1967 (1967) as follows:

> "Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. LINKLETTER v. WALKER, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed.2d 601, *supra;* TEHAN v. UNITED STATES ex rel SHOTT, (382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453,) *supra;* JOHNSON v. STATE OF NEW JERSEY, (384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882,) *supra.* 'These cases established the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application" . . .' JOHNSON, *supra* 384 U.S., at pp. 726, 727, 86 S.Ct. at 1777. *The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.*" (Emphasis added).

In UNITED STATES OF AMERICA ex rel BUTTCHER v. YEAGER, 288 F.Supp. 906, 909, District Judge Coolahan, in discussing the possible retroactive impact of JACKSON on the State of New Jersey, said:

> "In addition, the countervailing factors mentioned in the STOVALL decision are most strong in the circumstances of the present case. There can be no doubt that the New Jersey courts and law enforcement authorities have, since 1893, relied on the present system by which defendants pleading non vult to a murder indictment cannot be sentenced to more than life imprisonment. See STATE v. SULLIVAN, 43 N.J. 209, 243, 203 A.2d 177 (1964). Furthermore, the effect on the administration of justice, should it be determined that the JACKSON decision is

both retroactive and applicable to the New Jersey murder statute, would be disastrous, as every convicted murderer in New Jersey who, at the scheduled time for his trial, pleaded non vult to the indictment against him would be forthwith released from incarceration. This Court cannot conclude that the JACKSON decision is retroactive."

In KINCAID WILSON v. STATE OF NORTH CAROLINA, No. 2216, (E.D.N.C., February 27, 1969), District Judge Larkins in commenting upon the possible retroactivity of ALFORD v. NORTH CAROLINA, 405 F.2d 340, probable jurisdiction noted, No. 50. Fall Term, 1969, based upon the holding in JACKSON, stated:

"Another factor in the determination of the retroactive operation of a decision is the 'effect on the administration of justice.' TEHAN v. SHOTT, 382 U.S. 406, 418, 15 L.Ed. 2d 453, 461, 86 S.Ct. 459 (1966). In the TEHAN case, GRIFFIN v. CALIFORNIA, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), was not given retroactive operation because to 'require all those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.' TEHAN v. SHOTT, *supra*, 382 U.S. 406, 419. Since far more persons plead guilty than go to trial, the retroactive operation of ALFORD would be even more devastating.

"After full consideration of all the factors, this Court is not able to say that the rule in ALFORD v. STATE OF NORTH CAROLINA, *supra*, requires retroactive operation. This Court rejects the idea that if a statute was in force in 1963, and in 1968 its construction is changed so that it is no longer in force, it should be concluded that it was never in force. Quoting Justice Vinson in WARRING v. COLPOYS, 122 F. 2d 642, 647, certiorari denied 314 U.S. 678, 86 L.Ed. 543, 62 S.Ct. 184, 'It has often been

said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be down right chaotic.' Accordingly, the ALFORD rule shall only be applicable to those criminal actions commencing after November 26, 1968."

Commenting further upon ALFORD, District Judge Larkins, in CARMICHAEL v. STATE OF NORTH CAROLINA, No. 2102 (E.D.N.C., April 15, 1969) said:

"... the retroactive application of ALFORD would seriously disrupt the administration of the criminal laws within the State of North Carolina. If ALFORD were to be retroactively applied it could arguably necessitate the retrial of all defendants who have heretofore been convicted upon their pleas of guilty to indictments charging one of the capital crimes, or who, having been indicted for a capital offense, plead guilty to lesser included offenses. The Constitution does not require such a result. LINKLETTER v. WALKER, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965)."

The retroactive application of JACKSON has been the subject of several recent cases. The overwhelming weight of authority indicates that JACKSON is prospective in enforcement and not retroactive:

"This Court is asked to decide the issue of retroactivity only with respect to JACKSON as it applies to those who have pled guilty. The Court is of the opinion that JACKSON is not retroactive in this respect ...

"This factor, weighed with the purpose to be served by the JACKSON principle leads to the conclusion that purely prospective application is required ..." LONE v. UNITED STATES, (D.C.N. Calif.) — F. Supp. —, 5 Cr. L. 2248 (1969).

In PINDELL v. UNITED STATES, (D.C.Conn.) 296 F. Supp. 751, 753 (1969), the Court stated:

> "The petitioner alleges no other grounds for holding his plea involuntary. He asserts that as a matter of law, the potential death penalty alone is ground for a finding of coercion. This argument cannot be accepted, however, for doing so would amount to applying JACKSON retroactively . . .
>
> "As applied to the case at hand, the effect of the possible death penalty is simply a factor that can be considered in evaluating his claim that his plea was coerced; that judgment was entered on his guilty plea does not automatically require vacation of his sentence."

The LONE and PINDELL cases both deny retroactivity to JACKSON. A similar result was reached by the Court of Appeals of the District of Columbia in BAILEY v. UNITED STATES, 405 F.2d 1352 (1968). In the absence of actual coercion, courts have not retroactively applied JACKSON.

With respect to the Sixth Amendment right to a jury trial, upon which JACKSON was also bottomed, this right was not extended to the states through the Fourteenth Amendment until DUNCAN v. LOUISANA, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Prior to DUNCAN, a person involved in a State criminal proceeding did not have a constitutionally protected right to demand a jury trial. DUNCAN extended this right to state criminal proceedings. However, this Court subsequently held DUNCAN not to be retroactive.

> "We hold, however, that DUNCAN v. LOUISIANA . . . should receive only prospective application." DeSTEFANO v. WOODS, 392 U.S. 631, 633, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968).

It is submitted that inasmuch as JACKSON was partially based upon the Sixth Amendment, which was only sub-

sequently applied against the States in DUNCAN, that retroactivity must be denied to JACKSON.

The ruling in JACKSON was not foreshadowed in any case. The law enforcement authorities of the Federal Government and of all the states and territories have heretofore proceeded on the premise that such procedures, as now condemned, were constitutional. The statutory scheme condemned in JACKSON was assumed to be constitutional by the Federal Government, and the governments of the various states and territories. The impact of no other decision of this Court, except for GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), can have such an impact upon the administration of justice. Court calendars will be disrupted nationally, and post-conviction proceedings overwhelmed, if JACKSON is retroactively applied. Delay is well known as the best friend of defense counsel, and if retrials are now required, now that memories have faded and witnesses and evidence are no longer available, we could expect that prison gates would be opening wide to all capital felons convicted upon their pleas of guilty due to the weight of evidence of their guilt amassed years previously at their trials, but now, most probably, no longer available. The results are so frightful and devastating that further comment should not be required.

Our studies have shown that as of February 1, 1969, there were 448 inmates serving life sentences and a review of twenty percent (20%) of all files of these inmates produce the finding that 68.8% of all inmates serving life sentences were convicted upon pleas of guilty to capital charges and received the mandatory life sentence. It has been estimated that ninety percent (90%) of all criminal convictions are by pleas of guilty. D. Newman, The Determination of Guilt or Innocence Without Trial 4 (1966). In McCARTHY vs. UNITED STATES, 394 U.S. 1038 (1969), this Court noted that 82% of all convictions in Federal District Court are based upon pleas of guilty or nolo contendere, a figure comparable to those for previous years.

North Carolina does not stand alone among the states upon

which the devastating impact of retroactivity would fall. In ALFORD the Fourth District also concluded that the State of New Jersey's non-vult procedure was also unconstitutional. (N.J.S.A. 2A:113-3, 4) and New Jersey would be faced with retrying all murder convictions obtained upon non-vult pleas.

Although the State of New York has abolished the death penalty, New York will face a similar dilemma, since, upon a guilty plea, life imprisonment was imposed under former procedures for murder. (N.Y. Code of Cr. Proc. Sec. 332.1). South Carolina now submits the question of punishment to a jury in every capital case, but retroactivity will also affect their former procedure. (S.C.Code Sec. 17-553.4).

We can also illustrate that the JACKSON defect exists in Louisiana (La. Code of Crim. Procedures, Art. 557), New Hampshire (N.H. Rev. Stat. Ann. 585:4, 5), Wyoming (Wyo. Stat. Ann. Sec. 6-59), and Texas (Vernon's Ann. Code Crim. Proc. of Texas, Art. 1.14). And, if these states assume their various statutes were constitutional, what then can be said for the Federal Government which established a lengthy list of criminal statutes with JACKSON defects. The federal statutes, containing JACKSON defects, commencing with the Federal Kidnaping Act (18 U.S.C. 1201 (a)), includes 18 U.S.C. 1111 (murder), 21 U.S.C. 176b (sales of narcotics to minors), 42 U.S.C. 2274-76 (atomic secrets) and 18 U.S.C. 2113(e) (bank robbery). In addition, retroactivity will affect convictions under D. C. Code Ann. Sec. 22-2801 (rape).[3] The impact upon these eight (8) states, North Carolina, New Jersey, New York, South Carolina, Louisiana, New Hampshire, Wyoming and Texas, and perhaps others which our research failed to discover—will be devastating indeed—as will be the impact upon the federal government in all cases of prosecution under the tainted statutes.

There is at present a heavy burden upon the administration

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[3] In BAILEY v. UNITED STATES, supra, the Court of Appeals for the District of Columbia held that JACKSON was only to be prospectively applied.

of justice in all courts across the land—and this state, and our sister states, cannot stand the devastating impact if retroactivity of these doctrines is to stand. Our courts are overcrowded. Our citizens are subjected to ever increasing violence. No court system can absorb the thousands of cases that retroactive application of JACKSON would create. Delays would increase, justice will creep, and respect for judicial procedures will be a mockery if, now, at retrials the various states will be forced to free infamous felons because the defense lawyer's best friend—delay—will have made evidence and witnesses unavailable, and if available, witnesses will now have memories dimmed by the passage of time.

The evidence and witnesses were available for the original trials, often many years ago, and, because of the weight of the evidence available, the defendants pled guilty to the charges. We submit that the proper administration of justice compels a denial of retroactivity.

III

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FIFTH AMENDMENTS WERE NOT VIOLATED, HIS CONFESSION WAS NOT COERCED AND HIS GUILTY PLEA WAS NOT INVOLUNTARY.

The Honorable Joseph W. Parker, Judge Presiding, at the petitioner's post-conviction hearing, found as a fact:

> "Petitioner defendant was arrested at approximately 9:30 to 11:00 P.M. on July 16, 1964, while burglarizing, or attempting to burglarize the home of Mr. and Mrs. Silas M. Roland in the city of Roanoke Rapids, Halifax County, North Carolina, it being the identical home that he had a few nights previously burglarized and raped the female occupant; that he was carried to the ploice station and held for further investigation; that petitioner defendant refused to give his name and address and that, upon ascertainment by the officers of sufficient information of his identity, his mother, with whom he lived at the time,

was notified by the Police Department of Roanoke Rapids about 4:30 A.M. the following day, that is within approximately six hours of his arrest; that the mother of said petitioner defendant, upon the opening of the law office of Allsbrook, Benton, Knott, Allsbrook and Crawford early in the morning of July 17, 1964, employed the services of Honorable Dwight Cranford, a member of said firm, who is and was an experienced, learned, diligent and astute attorney and counsel at law, who immediately thereafter contacted said petitioner defendant and began preparation of his defense; that said petitioner defendant freely admitted to his attorney his guilt of the crime with which he was charged, in fact said petitioner defendant, Charles Lee Parker, upon cross examination at this hearing, and the Court so finds as a fact, freely admitted his guilt of the capital offense of burglary and rape; . . . (A. p. 28).

". . . that as the record unquestionaly reflects, and the Court so finds as a fact, said petitioner defendant Charles Lee Parker, freely, voluntarily, without threat, coercion or duress, entered a plea of guilty to the offense of first-degree burglarly before His Honor Howard H. Hubbard at the August Term, 1964, of the Superior Court of Halifax County and was thereupon sentenced as required by law to the North Carolina State Penitentiary for the term of his natural life; . . . (A. p. 29).

. . .

". . . that no particular statement has been made at these hearings denying the truthfulness of the petitioner defendant's plea and guilt of the offense charged. To the contrary, petitioner defendant, in person and from the witness stand, under oath, has admitted on cross examination the truth of the charge." (A. pp. 29-30).

At the time of petitioner's arrest he would not tell the officers his name or his address. (A. pp. 40, 44 and 45). At the post-

conviction hearing the petitioner contended that he asked to see his lawyer and his mother at the time of his arrest, but he refused to tell the officers either his mother's or lawyer's names. (A. p. 44).

The record in this case is devoid of any prolonged or continuous interrogation by the officers. Petitioner does not contend that he was physically abused in any way. He had eaten supper the night of his arrest and was arrested about 11:00 P.M. He was questioned for an hour or two, after which he was placed in a cell for the remainder of the night. Petitioner's mother was advised on the night of his arrest the he was in jail. (A. p. 51) The following morning the petitioner was again questioned for about an hour, at which time he signed a confession. Early that next morning the petitioner's mother awaited the opening of a law office and employed the services of an attorney to represent her son. The attorney, Dwight Cranford, Esq., arrived and talked with the petitioner and was advised by petitioner, a few minutes after his confession, that no threats had been made, no promises had been made, and that he was not scared. (A. pp. 66-67). The attorney discussed the possible consequences and detils of the case with petitioner and with petitioner's mother. Petitioner asked the attorney to plead him guilty. The attorney spent most of two days discussing the case with petitioner and his mother. (A. p. 67). The petitioner and his mother both signed affidavits that the petitioner's plea of guilty was understandingly made as to the seriousness of the offense and the punishment. (A. pp. 67-68).

Charlie Clark, Esq., witnessed petitioner's signature to the affidavit concerning the plea of guilty, was told by the petitioner that he knew what he was doing and the consequences of pleading guilty. (A. p. 73). The record further shows that the Judge Presiding at the original trial questioned the petitioner as to his plea of guilty, also questioned the petitioner's mother, and found that the defendant, under oath, understood thoroughly the import of his plea and that it was freely and voluntarily made." (A. pp. 46-47).

The record also indicates that petitioner, before making his plea of guilty, confessed his guilt to his attorney in the presence of his mother. (A. p. 54). In addition, the petitioner, at the post-conviction hearing, under oath, confessed his crime. (A. pp. 44-45).

Apparently, the only reason petitioner is now complaining is because a boy in prison told him he was getting a "raw deal" (A. p. 49).

It is crystal clear that petitioner's confession was not used at his trial. It is equally clear that his confession was freely and voluntarily made. Petitioner and his mother, after two days of consultation with the petitioner's attorney, reached an independent decision to enter a plea of guilty.

Petitioner relies upon GALLEGOS v. COLORADO, 370 U. S. 49 (1962). Obviously, the facts in PARKER are so different from GALLEGOS, a case in which the defendant was kept incommunicado for six days without seeing a lawyer, his parents or any friendly adult, is of no value as precedent in this matter. Additionally, petitioner's reliance upon ESCOBEDO v. ILLINOIS, 378 U. S. 478 (1964) is also unavailing. Petitioner contends that he requested and was denied an opportunity to see a lawyer. The unquestioned facts are contrary to this assertion.

Finally, petitioner contends a lack of proof bearing on the voluntariness of petitioner's plea of guilty. If the procedural safeguards presented in this case are not sufficient, then what can be sufficient? Counsel spent two days with petitioner and his mother and obtained affidavits from each. Prior to petitioner signing his affidavit, an independant witness was obtained to question the petitioner as to the voluntariness of his execution of the affidavit. This written submission of a plea of guilty was required by statute to be accepted by both the State and the Court. At the trial both petitioner and his mother were questioned as to the voluntariness of the plea. In view of the foregoing, it is submitted that overwhelming proof has

been presented as to the voluntariness of petitioner's plea.

CONCLUSION

For the foregoing reasons we respectfully submit that the opinion of the Court of Appeals of North Carolina be affirmed.

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CERTIFICATE

I, JACOB L. SAFRON, one of the attorneys for the Respondent, hereby certify that on September 5, 1969, I served a typewritten final copy of the foregoing Brief on the Attorney of Record for the Petitioner, Norman B. Smith, Esq., by handing and leaving with him personally, at Greensboro, North Carolina, a typewritten copy of the foregoing Brief.

JACOB L. SAFRON
Staff Attorney

Sworn to and subscribed before me
this 17 day of September, 1969.

FRANCES PARRISH
NOTARY PUBLIC
My Commission Expires: 4-10-71

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 268.—October Term, 1969

Charles Lee Parker, Petitioner, v. State of North Carolina. | On Writ of Certiorari to the Court of Appeals of North Carolina.

[May 4, 1970]

Mr. Justice White delivered the opinion of the Court.

At about 11 p. m. on July 16, 1964, petitioner was arrested after entering the yard of a home where a burglary and rape had been committed four days earlier. Petitioner, a Negro boy then 15 years old, was taken to the police station and was questioned for one or two hours. After the questioning, petitioner was placed alone in a dimly lit cell for the remainder of the night. Although petitioner refused to give even his name during the questioning, the police eventually determined his identity and notified petitioner's mother between 3:30 and 4:30 a. m. The next morning, petitioner was given drinking water and was then questioned by the police; petitioner almost immeditely confessed to the burglary and rape committed several days earlier at the house where he had been arrested. Shortly thereafter, an attorney retained by petitioner's mother came to the police station and talked with petitioner. Petitioner told the attorney that the confession had not been prompted by threats or promises and that he had not been frightened when he made the statement to the police.

Petitioner was indicted for first-degree burglary, an offense punishable by death under North Carolina law.[1] Petitioner's retained attorney discussed with petitioner and his mother the nature and seriousness of the charge. In due course, petitioner and his mother signed written statements authorizing the entry of a plea of guilty. Both petitioner and his mother were aware at the time they signed the authorization for the guilty plea that, if the plea was accepted, petitioner would receive the mandatory sentence of life imprisonment.[2] The prose-

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[1] In North Carolina the crime of first-degree burglary in defined as follows:

"There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree." N. C. Gen. Stat. § 14–51 (1969).

The punishment for first-degree burglary is death unless the jury recommends that the penalty be life imprisonment:

"Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." N. C. Gen. Stat. § 14–52 (1969).

[2] At the time petitioner's plea was entered, North Carolina law provided that if a plea of guilty to first-degree burglary was accepted the punishment would be life imprisonment rather than death:

"(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court . . . , may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatsoever.

"(b) In the event such a plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty

cutor and the trial judge accepted the plea. In accepting the plea on August 18, 1964, the trial court asked the petitioner if the plea was made in response to any promise or threat and petitioner answered in the negative; petitioner affirmed that he tendered the plea "freely without any fear or compulsion."[3] Upon acceptance of the plea, petitioner was sentenced to life imprisonment.

In 1967, petitioner, assisted by counsel, filed a petition under the North Carolina Post-Conviction Hearing Act[4] to obtain relief from his conviction. In his petition, Parker urged that his plea of guilty was the product of a coerced confession and that the indictment to which he pleaded was invalid because members of his race had been systematically excluded from the grand jury which returned the indictment. After a hearing, the Superior Court of Halifax County found that there was no deliberate exclusion of Negroes from the grand jury that indicted petitioner and that petitioner had freely admitted his guilt and had pleaded guilty "freely, voluntarily, without threat, coercion or duress . . . ." The Court of Appeals of North Carolina, the highest state

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of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison." N. C. Gen. Stat. § 15–162.1 (1965), repealed, effective March 25, 1969, c. 117, N. C. Session Laws of 1969.

[3] The Court: "Has anybody made you any promise or forced you in any way to make this plea?"

Petitioner: "No, sir."

. . . . .

The Court: "Did you sign this plea freely without any fear or compulsion?"

Petitioner: "Yes, sir."

The Court: "Has any person promised you anything if you do this?"

Petitioner: "No, sir." Appendix 46.

[4] N. C. Gen. Stat. §§ 15–217 to 15–222 (Supp. 1969).

court in which petitioner could seek review,[5] affirmed the conviction after reviewing not only the claims presented to the lower court but also the additional assertion by petitioner that his guilty plea was involuntary because North Carolina statutes at that time allowed a defendant to escape the possibility of a death penalty on a capital charge by pleading guilty to that charge. 2 N. C. App. 27, 162 S. E. 2d 526 (1968). We granted certiorari, 395 U. S. 974 (1969), to consider petitioner's federal constitutional claims. For the reasons presented below, we affirm.

I

Parker would have us hold his guilty plea involuntary and therefore invalid for two reasons: first because it was induced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a verdict of guilty by a jury; and second because the plea was the product of a coerced confession given to the police shortly after petitioner was arrested. Neither reason is sufficient to warrant setting aside Parker's plea.

It may be that under *United States* v. *Jackson*, 390 U. S. 570 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea.[6] Even so, we determined in *Brady* v. *United States*, *ante*, that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there

[5] N. C. Gen. Stat. § 7A–28 (1969).

[6] The statute authorizing guilty pleas to capital charges was repealed, effective March 25, 1969. See n. 2, *supra*. As a result of the repeal, a person who is charged with a capital offense and who is not allowed to plead to a lesser charge must apparently face a jury trial and a death penalty upon a verdict of guilty unless the jury recommends life imprisonment.

is a jury trial. In this respect we see nothing to distinguish Parker's case from Brady's.

Nor can we accept the claim that the plea was infirm because it was the product of a coerced confession. According to Parker's testimony at the post-conviction hearing, he was denied food and water, promised unspecified help if he confessed and denied counsel's advice when he requested it. In the record, however, was an abundance of evidence contradicting Parker's claim of coercion: Parker's statements to his attorney soon after his interrogation that there had been no threats or promises and that he had not been afraid, his similar declarations in his sworn statement authorizing his plea,[7] his answers to the trial judge at the time the plea was accepted,[8] and his failure to complain of any mistreatment by the police until many months after he began serving his sentence. The North Carolina courts accordingly refused to credit his testimony and concluded that his confession was a free and voluntary act.

We would in any event be reluctant to question the judgment of the state courts in this respect; but we need not evaluate the voluntariness of petitioner's confession since even if the confession should have been found involuntary, we cannot believe that the alleged conduct of the police during the interrogation period was of such a nature or had such enduring effect as to make involuntary a plea of guilty entered over a month later. Parker soon had food and water, the lack of counsel was immediately remedied, and there was ample opportunity to consider the significance of the alleged promises. After the allegedly coercive interrogation, there were no

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[7] In his affidavit authorizing the entry of a plea of guilty Parker stated that "I have not been threatened or abused in any manner by any person and no promises have been made to me if I plead guilty to any charge."

[8] See n. 3, *supra*.

threats, misrepresentations, promises, or other improper acts by the State. Parker had the advice of retained counsel and of his family for the month before he pleaded. The connection, if any, between Parker's confession and his plea of guilty had "become so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308 U. S. 338, 341 (1939); *Wong Sun* v. *United States*, 371 U. S. 471, 491 (1963). As far as this record reveals, the guilty plea was Parker's free and voluntary act, the product of his own choice, just as he affirmed it was when the plea was entered in open court.

II

On the assumption that Parker's confession was inadmissible, there remains the question whether his plea, even if voluntary, was unintelligently made because his counsel mistakenly thought his confession was admissible. As we understand it, Parker's position necessarily implies that his decision to plead rested on the strength of the case against him: absent the confession, his chances of acquittal were good and he would have chosen to stand trial; but given the confession, the evidence was too strong and it was to his advantage to plead guilty and limit the possible penalty to life imprisonment.[9] On this assumption, had Parker and his counsel thought the confession inadmissible, there would have been a plea of not guilty and a trial to a jury. But counsel apparently deemed the confession admissible and his advice to plead guilty was followed by his client. Parker now considers his confession involuntary and inadmissible. The import of this claim is that he suffered from

[9] The North Carolina Court of Appeals noted that the prosecution may have had strong evidence against Parker in addition to the confession and that if other strong evidence existed the guilty plea could not be viewed as the product of the confession. 2 N. C. App. 27, 32, 162 S. E. 2d 526, 529 (1968).

bad advice and that had he been correctly counseled he would have gone to trial rather than enter a guilty plea. He suggests that he is entitled to plead again, a suggestion which we reject.

For the reasons set out in *McMann* v. *Richardson*, *ante*, at —, even if Parker's counsel was wrong in his assessment of Parker's confession, it does not follow that his error was sufficient to render the plea unintelligent and entitle Parker to disavow his admission in open court that he committed the offense with which he was charged.[10] Based on the facts of record relating to Parker's confession and guilty plea, which we have previously detailed, we think the advice he received was well within the range of competence required of attorneys representing defendants in criminal cases. Parker's plea of guilty was an intelligent plea not open to attack on the grounds that counsel misjudged the admissibility of Parker's confession.

III

We also have before us the question whether the indictment to which Parker pleaded is invalid because members of his race were allegedly systematically excluded from the grand jury which returned the indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the grand jury must be

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[10] We find nothing in the record raising any doubts about the integrity of petitioner's admission. The following appears in the findings entered after the post-conviction hearing in the state trial court:

"said petitioner defendant freely admitted to his attorney his guilt of the crime with which he was charged, in fact said petitioner defendant Charles Lee Parker, upon cross examination at this hearing, and the Court so finds as a fact, has freely admitted his guilt of the capital offense of burglary and rape . . . ."

raised by motion to quash the indictment prior to the entry of the guilty plea.[11] Because Parker had failed to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. See *Fay* v. *Noia*, 372 U. S. 391, 428–429 (1963). We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief. *Ibid.* Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide. Compare *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (C. A. 5th Cir. 1959), cert. denied, 361 U. S. 838, 850 (1959), with *Labat* v. *Bennett*, 365 F. 2d 698 (C. A. 5th Cir. 1966), cert. denied, 386 U. S. 991 (1967). See also *McNeil* v. *North Carolina*, 368 F. 2d 313 (C. A. 4th Cir. 1966).

The North Carolina Court of Appeals correctly concluded that petitioner's plea of guilty was intelligent and voluntary; there was an adequate basis in North Carolina procedural law for the North Carolina Court of Appeals' refusal to consider the claim of racial exclusion in the composition of the grand jury that indicted petitioner.

Affirmed.

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[11] "All exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived. . . ." N. C. Gen. Stat. § 9–23 (1969).

See *State* v. *Rorie*, 258 N. C. 162, 128 S. E. 2d 229 (1962). Under North Carolina law, a guilty plea does not waive objections to racial exclusion in the selection of the grand jury if, before the plea of guilty, the defendant raises his objection in a motion to quash the indictment. *State* v. *Covington*, 258 N. C. 501, 128 S. E. 2d 827 (1963).

MR. JUSTICE BLACK, concurring.

I concur in the judgment of affirmance and also concur in the opinion except that part on page 4 stating, "It may be that under *United States* v. *Jackson*, 390 U. S. 570 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea."

SUPREME COURT OF THE UNITED STATES

Nos. 268 AND 270.—OCTOBER TERM, 1969

Charles Lee Parker, Petitioner, 268 *v.* State of North Carolina.	On Writ of Certiorari to the Court of Appeals of North Carolina.
Robert M. Brady, Petitioner, 270 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[May 4, 1970]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting in No. 268 and concurring in the result in No. 270.

In *United States* v. *Jackson*, 390 U. S. 570 (1968), we held that the operative effect of the capital punishment provisions of the Federal Kidnaping Act was unconstitutionally "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U. S., at 581. The petitioners in these cases claim that they were the victims of the very vices we condemned in *Jackson*. Yet the Court paradoxically holds that each of the petitioners must be denied relief even if his allegations are substantiated.[1] Indeed, the Court apparently holds that never, except perhaps in highly unrealistic hypothetical situations, will the constitutional

[1] The present discussion, while containing occasional references to the Federal Kidnaping Act, is equally applicable to *Parker*, for, as I shall demonstrate in Part II of this opinion, there is no pertinent distinction between the Kidnaping Act and the North Carolina statutes under which Parker was convicted.

defects identified in *Jackson* vitiate a guilty plea.[2] In so holding, the Court seriously undermines the rational underpinnings of *Jackson* and departs broadly from our prior approach to the determination of the voluntariness of guilty pleas and also confessions. This is merely one manifestation of a design to insulate all guilty pleas from subsequent attack no matter what influences induced them. I cannot acquiesce in this wholesale retreat from the sound principles to which we have previously adhered.

I

The Court properly notes the grave consequences for a defendant which attach to his plea of guilty; for the plea constitutes a simultaneous surrender of numerous constitutional rights, including the privilege against compulsory self-incrimination and the right to a trial by jury, with all of its attendant safeguards. *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969); *Boykin* v. *Alabama*, 395 U. S. 238, 242–244 (1969). Indeed, we

[2] The precise contours of the Court's theory, developed principally in *Brady* v. *United States*, are unclear. The Court initially states that "the possibility of a heavier sentence following a guilty verdict after a trial" is one of the "relevant circumstances" to be taken into account in determining the voluntariness of the guilty plea. *Ante*, at 7. Subsequently, however, after discussing its notion of voluntariness, the Court concludes that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Ante*, at 13. Elsewhere the Court states that "there is [no] evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Ante*, at 8–9. If the latter is what the Court deems to be the criterion of voluntariness, the holding is totally without precedent, for it has never been thought that an individual's mental state must border on temporary insanity before his confession or guilty plea can be found "involuntary."

have pointed out that a guilty plea is more serious than a confession because it is tantamount to a conviction. *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927). Accordingly, we have insisted that a guilty plea, like any surrender of fundamental constitutional rights, reflect the unfettered choice of the defendant. See *Boykin* v. *Alabama, supra; Machibroda* v. *United States*, 368 U. S. 487, 493 (1962). In deciding whether any illicit pressures have been brought to bear on a defendant to induce a guilty plea, courts have traditionally inquired whether it was made "voluntarily" and "intelligently" with full understanding and appreciation of the consequences.

The concept of "voluntariness" contains an ambiguous element, accentuated by the Court's opinions in these cases, because the concept has been employed to analyze a variety of pressures to surrender constitutional rights, which are not all equally coercive or obvious in their coercive effect. In some cases where an "involuntary" surrender has been found, the physical or psychological tactics employed exerted so great an influence upon the accused that it could accurately be said that his will was literally overborne or completely dominated by his interrogators, who rendered him incapable of rationally weighing the legal alternatives open to him.[3]

There is some intimation in the Court's opinions in the instant cases that, at least with respect to guilty pleas, "involuntariness" covers *only* the narrow class of cases in which the defendant's will has been literally overborne. At other points, however, the Court apparently recognizes that the term "involuntary" has traditionally been applied to situations in which an individual,

[3] See, *e. g., Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116 (1956); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1936).

while perfectly capable of rational choice, has been confronted with factors which the government may not constitutionally inject into the decision-making process. For example, in *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), we held a surrender of the self-incrimination privilege to be involuntary when an individual was presented by the government with the possibility of discharge from his employment if he invoked the privilege. So, also, it has long been held that certain promises of leniency or threats of harsh treatment by the trial judge or the prosecutor unfairly burden or intrude upon the defendant's decision-making process. Even though the defendant is not necessarily rendered incapable of rational choice, his guilty plea nonetheless may be invalid.[4]

Thus the legal concept of "involuntariness" has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations which the government cannot properly introduce. The critical question which divides the Court is what constitutes an impermissible factor, or, more narrowly in the context of these cases, whether the threat of the imposition of an unconstitutional death penalty is such a factor.[5]

Even after the various meanings of "involuntary" have been identified, application of voluntariness criteria in particular circumstances remains an elusory process because it entails judicial evaluation of the effect of

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[4] See, *e. g.*, *Machibroda* v. *United States*, 368 U. S. 487 (1962); cases cited, n. 7, *infra*.

[5] A further latent ambiguity in the concept of "voluntariness" arises from the notion that a plea is involuntary only if it is the product of coercion directly applied to the accused at the time his plea is entered, and hence that a plea cannot be tainted by prior unconstitutional action on the part of the government. With this view I am in disagreement for reasons more fully set forth in my dissenting opinion in *McMann* v. *Richardson*, — U. S. —, decided this day.

particular external stimuli upon the state of mind of the accused. See *Haley* v. *Ohio*, 332 U. S. 596, 603 (1948) (Frankfurter, J., concurring). Nevertheless, we have consistently taken great pains to insulate the accused from the more obvious and oppressive forms of physical coercion. Beyond this, in the analogous area of coerced confessions, for example, it has long been recognized that various psychological devices, some of a very subtle and sophisticated nature, may be employed to induce statements. Such influences have been condemned by this Court.[6] Thus, a confession is not voluntary merely because it is the "product of a sentient choice," if it does not reflect a free exercise of the defendant's will. *Id.*, at 606. Indeed, as the Court recognizes, we held in an early case that the concept of "voluntariness" requires that a confession "not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897). More recently, we held in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), that the Fifth and Fourteenth Amendments guarantee to every person the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence." 378 U. S., at 8. Cf. *Garrity* v. *New Jersey*, 385 U. S. 493 (1967).

The Court's answer to the stringent criterion of voluntariness imposed by *Bram* and subsequent cases is that the availability of counsel to an accused effectively offsets the illicit influence upon him which threats or promises by the government may impose. Of course,

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[6] See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Rogers* v. *Richmond*, 365 U. S. 534 (1961); *Spano* v. *New York*, 360 U. S. 315 (1959); *Haley* v. *Ohio*, 332 U. S. 596 (1948).

the presence of counsel is a factor to be taken into account in any overall evaluation of the voluntariness of a confession or a guilty plea. However, it hardly follows that the support provided by counsel is sufficient by itself to insulate the accused from the effect of any threat or promise by the government.

It has frequently been held, for example, that a guilty plea induced by threats or promises by the trial judge is invalid because of the risk that the trial judge's impartiality will be compromized and because of the inherently unequal bargaining power of the judge and the accused.[7] The assistance of counsel in this situation, of course, may improve a defendant's bargaining *ability*, but it does not alter the underlying inequality of *power*. Significantly, the Court explicitly refrains from expressing its views on this issue. (*Ante*, at 9, n. 8.) This is an unfortunate omission, for judicial promises of leniency in return for a guilty plea provide a useful analogy to what has occurred in the instant cases. Here, the government has promised the accused, through the legislature, that he will receive a substantially reduced sentence if he pleads guilty. In fact, the legislature has simultaneously threatened the accused with the ultimate penalty—death—if he insists upon a jury trial and promised a penalty no greater than life imprisonment if he pleads guilty.[8]

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[7] See, *e. g.*, *Scott* v. *United States*, 419 F. 2d 264 (C. A. D. C. Cir. 1969); *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308 (C. A. 2d Cir. 1963); *Euziere* v. *United States*, 249 F. 2d 293 (C. A. 10th Cir. 1957); *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244 (D. C. S. D. N. Y. 1966); *United States* v. *Tateo*, 214 Supp. 560 (D. C. S. D. N. Y. 1963); *Commonwealth* v. *Evans*, 434 Pa. 52, 252 A. 2d 689 (1969). See generally Note, Judicial Plea Bargaining, 19 Stan. L. Rev. 1082 (1967).

[8] The only alternative to a jury trial available to Parker under the North Carolina statutes was a plea of guilty. Under the Federal Kidnaping Act, however, the possibility existed that

It was precisely this statutorily imposed dilemma that we identified in *Jackson* as having the "inevitable effect" of discouraging assertion of the right not to plead guilty and to demand a jury trial. As recognized in *Jackson*, it is inconceivable that this sort of capital penalty scheme will not have a major impact upon the decisions of many defendants to plead guilty. In any particular case, therefore, the influence of this unconstitutional factor must necessarily be given weight in determining the voluntariness of a plea.[9]

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a defendant could contest his guilt in a bench trial and simultaneously avoid a potential death penalty. Nothing more appearing, it is arguable that an individual who pleaded guilty without seeking a bench trial did so for reasons other than the fear of the death penalty.

We have previously held, however, that there is no constitutional right to a bench trial, *Singer* v. *United States*, 380 U. S. 24 (1965), and under Federal Criminal Rule 23 the consent of both the trial judge and the prosecution is a prerequisite to the waiver of a jury trial. In *Brady* the trial judge indicated that he would not permit the case to be tried without a jury. Thus, in substance, the choice which confronted Brady—jury trial or guilty plea—was the same that faced Parker.

There is room for argument that a direct confrontation between a trial judge and the defendant would have more impact upon the accused than a statute. However, when the accused appears before the trial judge, he at least has an opportunity to present his views to the judge, and, if all else fails, to preserve a record for direct or collateral review of any overreaching by the trial court.

[9] North Carolina argues that *Jackson* ought not to be applied retroactively so as to affect guilty pleas entered prior to that decision. In one sense, of course, the *Jackson* retroactivity problem is chimerical, for the long-standing constitutional requirement that valid guilty pleas be voluntary and intelligent was not altered by that decision.

However, *Jackson* did apply the standard of voluntariness in a new context by considering the inducement to plead guilty supplied by an unconstitutional capital punishment scheme. In a sense,

To be sure, we said in *Jackson* that "the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." [10] 390 U. S., at 583. But that statement merely emphasized the obvious fact that it is perfectly possible that a defendant pleaded guilty for reasons entirely unrelated to the penalty scheme, for example, because his guilt was clear or because he desired to spare himself and his family "the spectacle and expense of protracted courtroom proceedings." 390 U. S., at 584. The converse, however, is equally clear: not every defendant who pleaded guilty under the Act did so voluntarily, that is, uninfluenced by the highly coercive character of the

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therefore, *Jackson* did in fact mandate a new application of the voluntariness test. To the extent that the retroactivity issue need be resolved, I have no difficulty in concluding that *Jackson* should be so applied to provide relief for those who suffered the very constitutional vices which we condemned in that case. The entry of a guilty plea concerns the very essence of the guilt-determining process, and, if that plea is involuntarily induced, the result is "to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott*, 382 U. S. 406, 416 (1966). See *Johnson* v. *New Jersey*, 384 U. S. 719, 727–729 (1966); *Linkletter* v. *Walker*, 381 U. S. 618 (1965).

[10] If this statement means that *no* plea can be rendered involuntary by the statutory scheme, it was at least an obscure, not to say highly misleading, way of saying so. *Laboy* v. *New Jersey*, 266 F. Supp. 581 (D. C. D. N. J. 1967), cited in *Jackson*, upon which the Court now seizes, is merely an example of a case which rejected an attack upon the voluntariness of a plea allegedly induced by fear of a death penalty. Surely it cannot be relied upon to establish guidelines with respect to the quantum of proof necessary to demonstrate the involuntariness of a plea under a *Jackson*-defective statute, particularly since the District Court in *Laboy* erroneously concluded, in dicta, that the Federal Kidnaping Act contained no constitutional infirmity.

penalty scheme. This much is merely the teaching of *Jackson*.

The Court has elected to deny this latter aspect of *Jackson*, but in doing so it undermines the rationale on which *Jackson* was decided. In *Jackson* we invalidated the death penalty provision of the Kidnaping Act because the Act's penalty scheme as a whole encouraged guilty pleas and waivers of jury trial, and in the circumstances of particular cases this improper influence could render pleas and waivers constitutionally involuntary. Today the Court appears to distinguish sharply between a guilty plea that has been "encouraged" by the penalty scheme and one that has been entered "involuntarily." However, if the influence of the penalty scheme can never render a plea involuntary, it is difficult to understand why in *Jackson* we took the extraordinary step of invalidating part of that scheme. Apparently in the Court's view, we invalidated the death penalty in *Jackson* because it "encouraged" pleas which are perfectly valid despite the encouragement. Rarely, if ever, have we overturned an Act of Congress for what proves to be so frivolous a reason. Moreover, the Court's present covert rejection of the *Jackson* rationale, together with its acceptance of the result in *Jackson*, leads to a striking anomaly. Since the death penalty provision of the Kidnaping Act remains void, those who resisted the pressures identified in *Jackson* and after a jury trial were sentenced to death receive relief, but those who succumbed to the same pressures and were induced to surrender their constitutional rights are left without any remedy at all. Where the penalty scheme failed to produce its unconstitutional effect, the intended victims obtain relief; where it succeeded, the real victims have none. Thus the Court puts a premium on strength of will and invulnerability to pressure at the cost of constitutional rights.

Of course, whether in a given case the penalty scheme has actually exercised its pernicious influence so as to make a guilty plea involuntary can be decided only by consideration of the factors that actually motivated the defendant to enter his plea. If a particular defendant can demonstrate that the death penalty scheme exercised a significant influence upon his decision to plead guilty, then, under *Jackson*, he is entitled to reversal of the conviction based upon his illicitly produced plea.

The Court attempts to submerge the issue of voluntariness of a plea under an unconstitutional capital punishment scheme in a general discussion of the pressures upon defendants to plead guilty which are said to arise from, *inter alia*, the venerable institution of plea bargaining. The argument appears to reduce to this: because the accused cannot be insulated from *all* inducements to plead guilty, it follows that he should be shielded from *none*.

The principal flaw in the Court's discourse on plea bargaining, however, is that it is, at best, only marginally relevant to the precise issues before us. There are critical distinctions between plea bargaining as commonly practiced and the situation presently under consideration—distinctions which, in constitutional terms, make a difference. Thus, whatever the merit, if any, of the constitutional objections to plea bargaining generally,[11] those issues are not presently before us.

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[11] See generally *Scott* v. *United States*, 419 F. 2d 264 (C. A. D. C. Cir. 1969); D. Newman, Conviction—The Determination of Guilt or Innocence Without Trial (1966); A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty §§ 3.1–3.4 (Tent. Draft 1967 and 1968 Supp.); President's Comm'n on Law Enforcement & Administration of Justice, The Challenge of Crime in a Free Society 134–137 (1967); Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387 (1970); Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865 (1964).

We are dealing here with the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.[12] No such flexibility is built into the capital penalty scheme where the government's harsh terms with respect to punishment are stated in unalterable form.

Furthermore, the legislatively ordained penalty scheme may affect any defendant, even one with respect to whom plea bargaining is wholly inappropriate because his guilt is uncertain.[13] Thus the penalty scheme presents a clear danger that the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty. This hazard necessitates particularly sensitive scrutiny of the voluntariness of guilty pleas entered under this type of death penalty scheme.

The penalty schemes involved here are also distinguishable from most plea bargaining because they involve the imposition of death—the most severe and awesome penalty known to our law. This Court has recognized that capital cases are treated differently in some respects than noncapital cases. See, *e. g.*, *Williams* v. *Georgia*, 349 U. S. 375, 391 (1955). We have identified the threat of a death penalty as a factor to be given considerable weight in determining whether a defendant has deliberately waived his constitutional rights. Thus, for

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[12] See generally D. Newman, Conviction—The Determination of Guilt or Innocence Without Trial 78–104 (1966).

[13] See, *e. g.*, *Bailey* v. *MacDougall*, 392 F. 2d 155, 158, n. 7 (C. A. 4th Cir.), cert. denied, 393 U. S. 847 (1968): "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an *admittedly guilty defendant*." (Emphasis added.)

example, in *Green* v. *United States*, 355 U. S. 184 (1957), it was contended that a defendant initially convicted of second degree murder upon an indictment charging first degree murder waived his double jeopardy objections to a second trial for murder in the first degree by taking a successful appeal. We rejected this argument, observing that

> "a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U. S., at 193.

So, also, in *Fay* v. *Noia*, 372 U. S. 391 (1963), it was argued that the petitioner had deliberately failed to seek redress through appeal of his conviction within the state appellate process and thus was not entitled to federal habeas corpus relief. Noting that the petitioner had been confronted with the "grisly choice" of forgoing his appellate rights or facing a possible death sentence if his appeal were successful, we held that the failure to seek state appellate review, motivated by fear of the death penalty, could not be interposed to bar the federal habeas corpus remedy.[14] 372 U. S., at 438–440.

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[14] A perceptive commentator, prior to our decision in *Jackson*, noted the interrelation of guilty pleas and an unconstitutional legislatively mandated capital punishment penalty scheme:

"It is incontrovertible that the [Federal Kidnaping] act promises a person pleading guilty at least substantial security from the imposition of capital punishment, while it threatens him with the ultimate sanction of the law—death. Can not the statute be accurately characterized as containing a *legislative promise of substantial security* from infliction of the death penalty in the event of a plea of guilty by the defendant? Is there any legitimate reason why a defendant's guilty plea under the act should be considered any less the product of coercion because it was induced by a legislative promise of substantial immunity than is a guilty plea induced by the previously mentioned judicial offers of sentencing concessions [in

Finally, under our express holding in *Jackson*, the death penalty in no circumstances could have been constitutionally imposed upon these defendants.[15] If they had been aware of the constitutional deficiency in the penalty scheme, they might well have decided to assert their right to a jury trial since the maximum penalty which could have been imposed after an unfavorable

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United States ex rel. Elksnis v. *Gilligan*, 256 F. Supp. 244 (D. C. S. D. N. Y. 1966), and *United States* v. *Tateo*, 214 F. Supp. 560 (D. C. S. D. N. Y. 1963)]? Can it be seriously contended that statements given by police officers in order to avoid being discharged from their employment are any more the product of coercion than is a guilty plea made by a defendant in mortal fear of the executioner's chair (citing *Garrity* v. *New Jersey*, 385 U. S. 493 (1967)]? In a capital case where a defendant is put to plea under the Lindbergh Law, he is faced with a choice 'between the rock and the whirlpool' [385 U. S., at 498], and coercion quite probably is inherent in his choice to waive his right to a jury trial." Note, *United States* v. *Jackson:* The Possible Consequences of Impairing the Right to Trial by Jury, 22 Rutgers L. Rev. 167, 189–190 (1967). (Emphasis in original.)

[15] Of course, no malevolent intent may be ascribed to the prosecution in seeking the death penalty prior to its invalidation in *Jackson*. That the death penalty could not have been exacted in the instant cases is, however, merely a consequence of the retroactive effect of *Jackson*. While the Court denies that *Jackson* affects the validity of guilty pleas, surely the Court would not insist that a sentence of death pronounced prior to our decision in *Jackson* could now be carried out. The Court's position, if I have accurately described it, does contain a certain paradoxical element. That is, any defendant who resisted the inducements of the *Jackson*-defective penalty scheme, received a jury trial and was sentenced to death, is presumably entitled to relief. However, the defendant who succumbed to the unconstitutional influence of that same scheme and pleaded guilty is left to suffer the consequences of his illicitly-induced plea. While the relaxation of what the Court terms "arid logic" may be viewed sympathetically if necessary to prevent executions under an unconstitutional penalty scheme, I am at a loss to understand what "human values" are preserved by the curious inversion which the Court has brought about.

jury verdict was life imprisonment. It is in this narrow context, involving a legislatively mandated unconstitutional death penalty scheme, that the defendant should be relieved of the rigid finality of his plea if he demonstrates that it was a consequence of the unconstitutional scheme.[16]

II

Turning to the facts of these particular cases, I consider first the contention that the North Carolina capital punishment scheme under which Parker was convicted (*ante*, at 2, nn. 1, 2), was constitutionally deficient under the standards set forth in *Jackson*. Although the Court assumes *arguendo* that the North Carolina statutes were indistinguishable from the Federal Kidnaping Act, this conclusion is, in my view, inescapable. Under North Carolina law as it formerly existed, the capital defendant had but two choices: he could demand a jury trial and

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[16] The Court apparently takes comfort from the authorities which it cites for the proposition that a guilty plea entered to avoid a possible death penalty is not involuntary. (*Ante*, at 13, n. 14.) This reliance is misplaced. In the first instance, most of these authorities antedate *Jackson* and therefore were uninstructed by that decision. For example, it does not appear in those cases whether the capital punishment scheme was defective under *Jackson* or otherwise unconstitutional. In this discussion, I do not consider the case of a death penalty scheme which is not unconstitutional under *Jackson*.

Secondly, several cases decided subsequent to *Jackson* take the position that a constitutionally defective capital penalty scheme may impermissibly induce guilty pleas. See, *e. g.*, *Alford* v. *North Carolina*, 405 F. 2d 340 (C. A. 4th Cir. 1968), probable jurisdiction noted, 394 U. S. 956 (1969), set for reargument, — U. S. — (1970); *Quillien* v. *Leeke*, 303 F. Supp. 698 (D. C. S. C. 1969); *Wilson* v. *United States*, 303 F. Supp. 1139 (D. C. W. D. Va. 1969); *Shaw* v. *United States*, 299 F. Supp. 824 (D. C. S. D. Ga. 1969); *Breland* v. *South Carolina*, — S. C. —, 169 S. E. 2d 604 (1969). See also *United States ex rel. Brown* v. *LaVallee*, — F. 2d — (C. A. 2d Cir. 1970); *Commonwealth* v. *Hargrove*, 434 Pa. 393, 254 A. 2d 22 (1969).

thereby risk the imposition of the death penalty, or he could absolutely avoid that possibility by pleading guilty.[17] If anything, the defect in the North Carolina statutory scheme was more serious than that in the statute considered in *Jackson,* for under the Kidnaping Act a defendant at least had a potential opportunity to avoid the death penalty and to have his guilt determined in a bench trial. Therefore, Parker is entitled to relief if he can demonstrate that the unconstitutional capital punishment scheme was a significant factor in his decision to plead guilty.

Parker comes here after denial of state post-conviction relief. The North Carolina courts have consistently taken the position that *United States* v. *Jackson* has no applicability to the former North Carolina capital punishment scheme.[18] Thus, the merits of Parker's contention that his plea was motivated by the unconstitutional death penalty have not been considered by the state courts. I would, therefore, reverse the judgment of the

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[17] Sophistic arguments cannot alter the fact that this in substance was the effect of the North Carolina penalty scheme. It is contended by North Carolina, for example, that under the state statutes the actual penalty imposed upon conviction was death but that the jury had the power to mitigate punishment to life imprisonment. Under the Federal Kidnaping Act, so the argument goes, the penalty upon conviction was life imprisonment, or a term of years, but the jury had the power to increase the sentence beyond that which the trial judge could impose, thereby "usurping the province of the judge in sentencing the defendant." This is a distinction without a difference. The simple fact is that under both the Kidnaping Act and the North Carolina scheme the jury alone, in its unfettered discretion, could impose the death sentence. In both instances the defendant was promised by the legislature complete insulation from this awesome possibility if he would plead guilty.

[18] See, *e. g., State* v. *Spence,* 274 N. C. 536, 164 S. E. 2d 593 (1968); *State* v. *Peele,* 274 N. C. 106, 161 S. E. 2d 568 (1968).

North Carolina Court of Appeals and remand the *Parker* case to that court for proceedings not inconsistent with the principles elaborated herein.[19]

III

In 1959 Brady was indicted under the Federal Kidnaping Act. The indictment alleged that the kidnaped person had "not been liberated unharmed." Thus Brady was subject to a potential sentence of death if he demanded a jury trial.[20] He ultimately elected to plead guilty, a decision which followed a similar action by his codefendant. Subsequently Brady was sentenced to 50 years' imprisonment. There exists in the record substantial evidence that Brady decided to plead guilty because the similar plea decision of his codefendant seriously undermined his own defense. It is also true that Brady was under the impression that the maximum penalty which could be imposed following a jury trial was the death sentence.

A hearing was held pursuant to Brady's motion under 28 U. S. C. § 2255 to vacate his sentence, at which Brady, his codefendant, and their trial attorneys testified. This hearing was completed after the District Court had decided the *Jackson* case, but before this Court had spoken in the matter. The district judge took the position that the death penalty provision of the Federal Kidnaping Act was constitutional. In this respect, of course, he erred. However, the district judge also concluded

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[19] In view of my position on the *Jackson* issue, I need not, in this case, reach Parker's other contentions, in particular that his guilty plea was the product of his allegedly coerced confession. I would direct that Parker's allegations concerning the coerced confession be considered on remand in proceedings not inconsistent with my views as expressed in *McMann* v. *Richardson*, — U. S. —, decided this day.

[20] As previously noted, the trial judge indicated that he would not permit Brady to be tried without a jury. See n. 8, *supra*.

that Brady "decided to plead guilty when he learned that his co-defendant was going to plead guilty" and that this decision was not induced or influenced improperly by anything the trial judge or his attorney had told him. The District Court further found that "the plea of guilty was made by [Brady] by reason of other matters and not by reason of [the Kidnaping Act]."

The decision in the Court of Appeals for the Tenth Circuit was rendered after our decision in *Jackson*. The Court of Appeals correctly pointed out that not every plea entered under the Federal Kidnaping Act is necessarily invalid and ultimately concluded that "[t]he finding of the trial court that the guilty plea was not made because of the statute but because of other matters is supported by substantial evidence and is binding on us."

An independent examination of the record in the instant case convinces me that the conclusions of the lower courts are not clearly erroneous. Although Brady was aware that he faced a possible death sentence, there is no evidence that this factor alone played a significant role in his decision to enter a guilty plea. Rather, there is considerable evidence, which the District Court credited, that Brady's plea was triggered by the confession and plea decision of his codefendant and not by any substantial fear of the death penalty. Moreover, Brady's position is dependent in large measure upon his own assertions, years after the fact, that his plea was motivated by fear of the death penalty and thus rests largely upon his own credibility. For example, there is no indication, contemporaneous with the entry of the guilty plea, that Brady thought he was innocent and was pleading guilty merely to avoid possible execution. Furthermore, Brady's plea was accepted by a trial judge who manifested some sensitivity to the seriousness

of a guilty plea and questioned Brady at length concerning his guilt and the voluntariness of the plea before it was finally accepted.

In view of the foregoing, I concur in the result reached by the Court in this case.